KEY TO BRIEFS

1 PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 398

LOUISIANA POWER & LIGHT COMPANY, Petitioner

versus

CITY OF THIBODAUX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PELTIER & PELTIER,
Harvey Peltier,
MONROE & LEMANN,
J. Blanc Monroe,
Monte M. Lemann,
J. Raburn Monroe,
Malcolm L. Monroe,
Melvin I. Schwartzman,
Andrew P. Carter,
1424 Whitney Building,
New Orleans, La.,
Attorneys for Petitioner.

Montgomery & Co., "The Brief Specialists", 430 Chartres St., N. O., La.

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CITATIONS.

Cases:

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No. _____

LOUISIANA POWER & LIGHT COMPANY, Petitioner

versus

CITY OF THIBODAUX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Louisiana Power & Light Company, through undersigned counsel, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on July 15, 1958.

OPINIONS BELOW.

The original opinion of the Court of Appeals (App. A, *infra*, pp. 20-30) and the opinion on rehearing of the Court of Appeals (App. B, *infra*, pp. 31-32) are not yet officially reported. The opinion of the District Court is reported at 153 F. Supp. 515.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 15, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The jurisdiction of the District Court was invoked because of diversity of citizenship, Plaintiff being a citizen of Louisiana and Defendant a citizen of Florida.

QUESTIONS PRESENTED.

1. Is an order of the United States District Court staying proceedings in an expropriation suit brought under an uninterpreted state statute, pending clarification of said state statute, a "final decision" such as would give a right of appeal under the Judicial Code (28 U.S.C. 1291) or an "interlocutory order . . . granting" an injunction under the Judicial Code (28 U.S.C. 1292 (1))?

2. Does a United States District Court have the inherent power in a case at law to exercise the discretion of staying proceedings in order to control the progress of the cause before it in an orderly manner?

3. Assuming that a United States District Court does have discretion to stay proceedings in order to control the progress of a law case before it in an orderly manner, did the District Court abuse that discretion?

STATUTES INVOLVED.

The statutory provisions involved are 28 U.S.C. 1291; 28 U.S.C. 1292 (1): Rule 42 (b) of the Federal Rules of Civil Procedure. They are printed in Appendix C, *infra*, pp. 33-34.

STATEMENT.

Louisiana Power & Light Company has provided electric service to the Parish of Lafourche for many years by virtue of a franchise granted by that Parish. The City of Thibodaux (herein referred to as the "City") is located in Lafourche Parish. Although the City had extended its limits several times during recent years, it had recognized the right of Petitioner to serve the customers within areas of Lafourche Parish which had been incorporated into the City after Petitioner had started serving these areas. But, on February 4, 1957, the City instituted an action, allegedly under the authority of Louisiana Act 111 of 1900, in the Seventeenth Judicial District Court of Louisiana, seeking to expropriate not only some of Petitioner's property in these areas, but also its rights to serve in these areas. Petitioner removed the suit to the United States District Court for the Eastern District of Louisiana on February 15, 1957. Thereafter, Petitioner answered the complaint, interposing *inter alia* defenses involving the United States Constitution, the Louisiana Constitution, and the interpretation, validity and conflict of certain Louisiana statutes. Argument was heard upon certain of the defenses set forth in Petitioner's answer and, on June 21, 1957, the District Court (through Judge J. Skelly Wright) issued an interlocutory order staying the proceedings for the reasons quoted in part below:

> "Although the power of eminent domain inheres in the United States and several states as an incident to their sovereignty,[3] the grant of that power by these sovereigns to one of their subdivi-

"[3] Georgia v. Chattanooga, 264 U. S. 472; Kohl v. United States, 91 U. S. 367; Pollard's Lessee v. Hagan, 44 U. S. 212."

sions will never pass by implication, for the power of eminent domain is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice.[4] When the power is granted by the state to one of its subdivisions, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained.[5] A federal court, therefore, before recognizing the exercise of power of eminent domain by a subdivision of a state under a state statute, must make certain that that power has been granted by the state to the subdivision in the form of its attempted exercise.

"There are no state court decisions to guide this court in the resolution of this problem. In fact, it does not appear that any court at any time has ever interpreted Act 111 of 1900. The Attorney General of the State of Louisiana, in an opinion rendered October 10, 1951,* in a situation identical to the one in suit, advises that a city may not expropriate a part of a utility system, in an area recently acquired by extension of the city limits, for the purpose of adding those facilities to the presently existing municipally operated utility. While the opinion of the Attorney General, of course, is not binding on this court under Erie R.

"[4] Delaware, Lackawanna & Western R. Co. v. Morristown, 276 U. S. 182; Richmond v. Southern Bell Telephone and Telegraph Com., 174 U. S. 761; Orleans-Kenner E. Ry. Co. v. Metairie Ridge Nursery Co., 136 La. 938, 68 So. 93; Breaux v. Bienvenu, 50 La. Ann. 1324, 25 So. 321; Martin v. Patin, 16 La. 55; La. C. C. Art. 699."

"[5] See Note 4."

*Opinion set forth as Appendix D hereto.

Co. v. Tompkins, 304 U. S. 64, nevertheless, coming from the chief legal officer of the state whose statute is to be interpreted, it gives this court pause. It points up the fact that no authoritative interpretation of the statute has ever been made by a Louisiana court. And before a federal court, under its diversity of citizenship jurisdiction, ventures into the field of expropriation under authority of a heretofore uninterpreted Louisiana statute, the need for guidance from the Supreme Court of Louisiana becomes clear.

"Under these circumstances, the only way this court can determine with certainty whether the power sought to be exercised here exists in the City of Thibodaux is to have a decision of the Supreme Court of Louisiana so holding. An interpretation of the expropriation statute in suit may be obtained through the Louisiana Declaratory Judgment procedure[6] and this court may act with assurance in these proceedings after such interpretation is obtained.[7] Further proceedings herein, therefore, will be stayed until the Supreme Court of Louisiana has been afforded an opportunity to interpret Act 111 of 1900."

The City appealed this order to the United States Court of Appeals for the Fifth Circuit and, on April 18, 1958, that Court reversed and remanded the cause to the District Court, holding that, since this suit was one at law, the order was in the nature of an injunction and, further that the District Court had no power or discretion

"[6] La. R. S. 13:4231 et seq.

"[7] See Leiter Minerals, Inc. v. United States, 352 U. S. 220, 229."

to stay proceedings. Rehearing was denied in a *per curiam* opinion of July 15, 1958, which amended and modified the original opinion insubstantially.

REASONS FOR GRANTING THE WRIT.

I. The decision of the Court of Appeals is in conflict with that of the Court of Appeals for the Third Circuit and the Second Circuit.

II. The decision of the Court of Appeals is in conflict with decisions of the United States Supreme Court.

III. The decision of the Court of Appeals is in conflict with a recent decision of another panel of that same Court of Appeals.

IV. The decision of the Court of Appeals raises serious questions which are of fundamental importance to the proper functioning of the Federal Judiciary and a proper administration of the Federal practice and procedures.

HOLDINGS OF COURT OF APPEALS.

The gravamen of the holdings of the Court of Appeals with which we disagree in this matter may be stated briefly as two:

FIRST HOLDING—This is a condemnation proceeding and therefore is a law matter, as distinguished from equity, and for that reason any stay in the proceeding amounts to an "injunction" within the meaning of 28 U.S.C. 1292 (1) and is appealable;

SECOND HOLDING—Since this is a matter at law, the District Court was not "required or permitted" to

stay the proceedings pending "state adjudication of state issues."

As to both holdings, we submit, the Court of Appeals was in error and in conflict, directly and in principle, with decisions of this Honorable Court and several of the Courts of Appeal.

First Holding—Any Stay in Proceeding at Law Amounts to an Injunction.

It is a general principle of law relating to condemnation proceedings that piecemeal appeals are to be avoided. In *Catlin v. United States*, 324 U. S. 229, this Court said:

> "Hence, ordinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here."

The holding in the instant case is in direct conflict with the above pronouncement.

The first holding herein is also in direct conflict with another and recent decision of the Fifth Circuit Court of Appeals. In *U. S. v. Richardson*, 204 F. (2d) 552 (CA-5, 1953), the Court of Appeals for the Fifth Circuit was confronted with an appeal from a District Court stay order in a condemnation proceeding. The stay order was predicated upon the use of discovery proceedings in the trial of the matter. A panel consisting of Judges

Hutcheson, Borah, and Russell, wrote on the point under discussion here:

> "It is clear, we think, that the order appealed from is not a final decision within the meaning of Section 1291, 28 U.S.C. It is well settled that a condemnation proceeding is not reviewable until after final judgment disposing of the whole case and adjudicating all rights, including ownership and just compensation as well as the right to take property. 'The foundation of this policy is not in merely technical conceptions of 'finality'. It is one against piecemeal litigation. 'The case is not to be sent up in fragments * * *' Catlin v. United States, 324 U. S. 229, 65 S. Ct. 631, 634, 89 L. Ed. 911; (citing other cases).
>
> "Nor is the interlocutory order of June 30, 1952, appealable as an injunction under 28 U.S.C. 1292. The court in the exercise of its inherent powers and in an effort to insure that appellee be not denied due process merely granted a stay or (sic) proceedings the overall effect of which was to condition appellant's right to proceed on compliance with the discovery process. The stay order entered in this case is not an injunction within the meaning of Section 1292." Citing *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440)

We respectfully suggest, on the basis of the foregoing, that there is a real and direct conflict on this first holding with the decision of this Court in *Catlin v. U. S.*,

supra, and with another panel of the Court of Appeals for the Fifth Circuit in *U. S. v. Richardson, supra*.

This conflict is not merely of a technical or academic nature. It cuts across the universal principle, especially applicable to condemnation proceedings, of not permitting piecemeal appeals. It is substantially important to this very same proceeding: If it is finally determined that the District Court's stay order is appealable, then the State and Federal Constitutional and statutory questions raised by Petitioner will have to be decided in the first instance by the District Court. In that event, the holding that this stay order is appealable would certainly be the law of the case here and would leave available to this Petitioner the right to an appeal at that point to the Court of Appeals upon moving the District Court for a stay pending appeal and a denial by the District Court of that motion for stay. This would be particularly proper in view of the District Court having already excised the issues raised by this Petitioner under Federal Rule of Civil Procedure 42 (b) and commenced the trial of those issues as "separate issues".

Second Holding—District Court Had No Discretion or Authority to Stay Proceedings.

In the original decision in this matter, the Court of Appeals held that **only** in equity cases was there a "doctrine of abstention". The Court then reasoned that since this was a matter at law, the "doctrine of abstention" was not applicable and the stay order was not permissible. This fallacious reasoning was not in any way altered by the modifications of the decision on rehearing in which

the Court simply retreated from the "only" language to the use of the word "usually":

> "While the doctrine of abstention has been applied usually in equity cases, including the Magnolia case in bankruptcy, it does not, of course, follow that equity jurisdiction alone is enough to warrant the use of the doctrine."

This holding did not even dispose squarely of the issue being raised. This Petitioner was contending that, while most cases where stay orders are at issue arise out of equitable defenses, this fact did not alter or dilute or discard the principle that a District Court in a law matter has the inherent power to control the progress of the cause before it in order to maintain the orderly processes of justice. The Court disposed of this principal contention of Petitioner by stating that:

> "The expropriation proceeding from which this appeal stems is not one where equitable jurisdiction and the discretion incident to such jurisdiction are present. Nor do we find present any such exceptional circumstances as would require or permit the district court to delay its determination of the case pending a state adjudication of state issues."

It is our appreciation of this language that the Court of Appeals is holding that the district court had no authority or right to stay this proceeding since it was not one of equitable jurisdiction.

It seems to us that this holding by the Court of Appeals presents a direct conflict in principle with the

holding of the Supreme Court in *Enelow v. New York Life Insurance Company*, 293 U. S. 379, where, at page 381 thereof, it was said:

> "This section contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, AS DISTINGUISHED FROM A MERE STAY OF PROCEEDING WHICH A COURT OF LAW, as well as a court of equity, MAY GRANT IN A CAUSE PENDING BEFORE IT BY VIRTUE OF ITS INHERENT POWER TO CONTROL THE PROGRESS OF THE CAUSE SO AS TO MAINTAIN THE ORDERLY PROCESSES OF JUSTICE. . . ." (Emphasis added).

Although the above-quoted pronouncement seems to us altogether clear as to the power of the District Court in a law matter and the appealability of stay orders in such cases, it is safe to say that this point has generated a great deal of disagreement among the Courts of Appeal and confusion along with it.

In *Council of Western Electric Technical Employees v. Western Electric Company*, 238 F. (2d) 892, Judge Learned Hand, speaking for the Second Circuit, attempted to simplify the rule of law here at issue. In an appeal from an order denying a motion for stay under the Federal Arbitration Act, it was said:

> "The first question, although the parties have not raised it, is whether we have any jurisdiction over the appeal. **Amid the existing confusion of decisions it is hard to proceed with as-**

> surance; but we take it as now settled that the grant, or denial, of a stay in an action that would have been a suit in equity before the fusion of law and equity is now not appealable under Section 1292 (1) of Title 28; but, if the order is in an action that would have been an action at law before that time, it is appealable." (Emphasis added).

Judge Hand's rule appears to be an over-simplification of the problem, as well as being in conflict with what was said in the *Enelow* case. The *Enelow* decision did not seek to make such a pure distinction between equity and law cases; in fact, it specifically pointed up and emphasized that a court in a law matter had the power to issue a stay order which would not be appealable, where the stay order was but a step in the control of the progress of the cause.

It is apparent that the Third Circuit has an entirely different view of the *Enelow* case from that entertained by Judge Hand and the Fifth Circuit here. In *United States v. Horns*, 147 F. (2d) 57, the Third Circuit was presented with an appeal from an order of District Court denying a motion for stay of criminal proceedings in order to allow the defendants to obtain a determination of a protest against certain regulations of the Price Administrator. In passing upon the question of appealability of this denial of a stay, the Court said:

> "In the Enelow case the Supreme Court, however, made it clear that **if a court of law itself grants a stay in proceedings before it** or a court of equity grants a stay in proceedings before it **the stay is not an injunction. In such a case the stay**

is granted by virtue of the court's inherent power to control the progress of the cause pending before it so as to maintain the orderly processes of justice. It is only when the power possessed by a court of equity to stay proceedings in another court is exercised that the court's action amounts to the grant or refusal of an injunction. This distinction was stressed in Cover v. Schwartz, 2 Cir., 1940, 112 F. (2d) 566, and is controlling here." (Emphasis added).

It is also apparent that Judge Hand's over-simplified rule is directly contrary to the decision of the Second Circuit in *Cover v. Schwartz*, 112 F. (2d) 566, on the panel of which, curiously enough, was Judge Hand. In the Cover case, the Second Circuit said:

"The Supreme Court in Enelow v. New York Life Insurance Company, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440, discussed the effect of Section 129 and **pointed out the distinction between mere stays which a court of law as well as a court of equity may grant by virtue of inherent power to control the progress of a cause pending before it in furtherance of orderly processes of justice,** on the one hand, **and injunctions given by a court of equity, on principles peculiar to equity, to stay proceedings in another cause pending before the same court or before another court,** on the other hand. It was held that an order made under Section 274b of the Judicial Code, 28 U.S.C. sec. 398, 28 U.S.C.A. Sec. 398, staying further progress on an action at law until after the trial of an equitable defense, was in

substance an injunction, to the same extent as if the court had acted under the older procedure of a separate suit in equity, and was appealable by reason of Section 129. Shanferoke Coal & Supply Corporation v. Westchester Service Corporation, 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583, is to the same effect. In the present case the order which aggrieves the plaintiff is merely a temporary stay imposed by the district court as part of its control over the cause pending before it." (Emphasis added).

There is also a direct conflict of the decision of the Fifth Circuit here with a recent decision by that same Court, with another panel presiding. In *United Gas Pipe Line Company v. Tyler Gas Service Company*, 247 F. (2d) 681, the Fifth Circuit was presented with an appeal from a stay order granted to the defendant until determination of a pending appeal by the defendant of a rate increase. The panel in that case was Judges Borah, Rives, and Brown. (The panel in the instant case is made up of Judges Hutcheson, Tuttle, and Jones). The Court held that the stay was not an injunction, employing this language:

"United filed a double-barreled affair here. It contended that the stay by the judge of further proceedings in the action in his own court amounted to an injunction or restraining order from which under the Code, 28 U.S.C.A. Sec. 1292 (1), an appeal lies even though interlocutory. As to this, we do not think this was such an order. It related solely to the conduct of that suit itself. It did not purport to forbid action by anyone, court or liti-

gant, in any other place or proceeding. It was purely a control of certain phases of that particular lawsuit. Confessedly an interlocutory order, there is no basis for an appeal unless, as this is not, this was an injunction. (Citing numerous cases) United's appeal must therefore be dismissed."

This decision in the *United Gas* case is diametrically opposite to the decision in the case at bar and represents an irreconcilable conflict as between two panels of the same Fifth Circuit.

Further illustrative of the rather chaotic confusion on this issue is the decision of the Second Circuit in *Wilson Brothers v. Textile Workers Union of America*, 224 F. (2d) 176, in which that Court conceded that there is "some confusion" on this issue of appealability from stay orders.

We suggest that the above review indicates with considerable clarity that there is present and existing a conflict among the various Circuit Courts, and within the Fifth Circuit, as to the proper application of 28 U.S.C.A. 1292 (1) in connection with grants or denials of stay orders. The confusion and conflict seems to stem from the diversity of views as to whether the *Enelow* case stands for the proposition that **any** stay order in a law matter is tantamount to an "injunction" within the meaning of Section 1292 (1) and therefore appealable, as espoused by Judge Hand, or whether the rule of the *Enelow* case is, as we believe it to be, that a District Court has the inherent power to control the progress of a cause pending

before it in furtherance of the orderly processes of justice, and a stay order in a law matter would be appealable only if its issuance is beyond the court's discretion as a court of law in the matter of orderly control of proceedings and necessarily requires for its justification the exercise of the court's equitable powers, in which event the District Court would be acting as an equity chancellor staying a proceeding in a law matter. This latter view, we submit, is in accord with the language of the following cases:

Baltimore Contractors v. Bodinger, 348 U. S. 176:

> "Whether the District Court was right or wrong in its ruling that the contract provision did not require arbitration proceedings, **it was simply a ruling in the only suit pending, actual or fictional.**" (Emphasis added).

Morgantown v. Royal Insurance Company, 337 U. S. 254:

> "This is not a situation where a 'chancellor' in denying a demand for jury trial can be said to be enjoining a 'judge' who has cognizance of a pending action at law. **This is rather a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself. . . .** The fiction of a court with two sides, one of which can stay proceedings in the other, is not applicable where there is no other proceeding in existence to be stayed." (Emphasis added).

United States v. Horns, supra:

> ". . . if a court of law **itself** grants a stay in proceedings before it . . . **the stay is not an injunction.** In such a case the stay is granted by virtue of the court's inherent power to control the progress of the cause pending before it so as to maintain the orderly processes of justice."

Cover v. Schwartz, supra:

> "In the present case the order which aggrieves the plaintiff is merely a temporary stay imposed by the district court as part of **its** control over the cause pending before it." (Emphasis added).

United Gas Pipe Line Company v. Tyler Gas Service Company, supra:

> "As to this, we do not think this was such an order. It related solely to the conduct of **that suit itself.** It did not purport to forbid action by anyone, court or litigant, **in any other place or proceeding.** It was purely a control of certain phases of **that particular lawsuit."** (Emphasis added).

This view was summed up concisely in *Day v. Pennsylvania Railroad Co.*, 243 F. (2d) 485 (CA-3, 1957), when it was said:

> "We are satisfied that under these circumstances the stay order of the district court was not an injunction based on an equitable defense or counterclaim but **merely a regulation of the course of the action itself.** The Supreme Court in Enelow v. New York Life Insurance Company, 293 U. S. 379,

55 S. Ct. 310, 79 L. Ed. 440, made it clear that such a stay of proceedings is not an injunction but is granted by a court 'in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice.' The same distinction was recently reiterated by the Supreme Court in Baltimore Contractors v. Bodinger, 348 U. S. 176, 75 S. Ct. 249, 99 L. Ed. 233, when the court said with respect to an order staying proceedings pending arbitration:

'This ruling was a step in controlling the litigation before the trial court, not the refusal of an interlocutory injunction'."

Rule 42 (b) of the Federal Rules of Civil Procedure provides for separate trials of any separate issues. If, therefore, the Court of Appeals is correct in this case, its decision effectively destroys the meaning of Rule 42 (b) and wipes out in large measure the District Courts' discretion in this regard. We urge that this is an important and vital question as to the administration of the Rules of Procedure by the Federal Judiciary throughout the United States and a clarification is indicated.

CONCLUSION.

It appearing that, as to both holdings of the Court of Appeals, there are numerous conflicts among the various Courts of Appeal, and it further appearing that these conflicts are of significant importance to the understanding and administration of 28 U.S.C.A. 1292 (1), Petitioner

respectfully suggests that certiorari should be granted to review the judgment of the court below.

Respectfully submitted,

PELTIER & PELTIER,
MONROE & LEMANN,
J. Blanc Monroe,
Monte M. Lemann,
J. Raburn Monroe,
Malcolm L. Monroe,
Melvin I. Schwartzman,
Andrew P. Carter,
Attorneys for Petitioner.

By _____

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,870

CITY OF THIBODAUX,
Appellant,

versus

LOUISIANA POWER & LIGHT COMPANY,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 18, 1958.)

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

JONES, Circuit Judge: The City of Thibodaux, Louisiana, supplied electric current to consumers within its territorial area. It extended its boundaries and annexed an area which had been supplied with electric current by the Louisiana Power & Light Company. The

City brought a suit for expropriation in a Louisiana District Court against the power company seeking to acquire the electric distribution facilities situate in the annexed area. The City asserted that the power to condemn had been granted by a legislative enactment of 1900 which provided:

"Any municipal corporation of Louisiana may expropriate any electric light, gas, or waterworks plant or property whenever such a course is thought necessary for the public interest by the mayor and council of the municipality. When the municipal council cannot agree with the owner thereof for its purchase, the municipal corporation through the proper officers may petition the judge of the district court in which the property is situated, describing the property necessary for the municipal purpose, with a detailed statement of the buildings, machinery, appurtenance, fixtures, improvements, mains, pipes, sewers, wires, lights, poles and property of every kind, connected therewith, and praying that the property described be adjudged to the municipality upon payment to the owner of the value of the property plus all damages sustained in consequence of the expropriation. Where the same person is the owner of both gas, electric light, and waterworks plants, or of more than one of any one kind of plant, the municipal corporation may not expropriate any one of the plants without expropriating all of the plants owned by the same person.

"All claims for damages to the owner caused by the expropriation of any such property are

barred by one year's prescription, running from the date on which the property was actually taken possession of and used by the political corporation." L. S. A. Title 19, § 101.

Diversity of citizenship formed the basis for removal to the United States District Court.

The power company, among other things, alleged in its answer that it had a franchise to serve the area with electric current and that if the quoted statutory provision be so construed as to permit the expropriation of its property it would be unconstitutional and invalid as impairing the obligation of its franchise contract and the taking of its property without due process of law. In addition to these questions arising under the Federal Constitution, the appellee asserted that the Louisiana statute violated four separate provisions of the Louisiana Constitution. A pre-trial conference was held. The district court concluded that since the statute had not been construed nor its validity passed upon by the Louisiana courts, the proceedings in Federal court should be stayed until a decision interpreting the Act by the Supreme Court of Louisiana could be obtained through the Louisiana Declaratory Judgment procedures. *City of Thibodaux v. Louisiana Power & Light Company*, 153 F. Supp. 515. By the district court's order further proceedings were stayed until the Supreme Court of Louisiana has been afforded an opportunity to interpret the Louisiana statute. The City appealed from the stay order. The power company has moved to dismiss the appeal on the ground that the order is not a final judgment and hence not appealable.

Under the Federal statute[1] only civil actions may be removed from a state to a Federal Court. Although some state condemnation proceedings may not be, at every stage, removable civil actions,[2] the expropriation suit authorized by the Louisiana act is a controversy between parties which is to be submitted to a judicial tribunal for determination by an exercise of the judicial power. Such proceeding is a civil action and so may be removed where, as here, diversity of citizenship and jurisdictional amount are present.[3]

The question is raised as to whether the order is one from which an appeal can be taken. The stay order of the district court is not a final decision under 28 U.S.C.A. § 1291.[4] Is it then an interlocutory order granting or denying an injunction, which is appealable under 28 U.S.C.A. § 1292? It is not an injunction in form. Whether it is injunctive in substance is a question which is not without difficulty.[5] We think that the rule as it has been evolved is as has been thus stated:

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[1] 28 U. S. C. A. § 1441.

[2] Chicago Rock Island & Pacific Railroad Company v. Stude, 346 U. S. 574, 74 S. Ct. 290, 98 L. Ed. 317; Village of Walthill v. Iowa Electric Light & Power Co., 8th Cir. 1956, 228 F. 2d 647.

[3] Searl v. School District No. 2, 124 U. S. 197, 8 S. Ct. 460, 31 L. Ed. 415; Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U. S. 239, 25 S. Ct. 251, 49 L. Ed. 462.

[4] Baltimore Contractors, Inc. v. Bodinger, 348 U. S. 176, 75 S. Ct. 249, 99 L. Ed. 233.

[5] See Enelow v. New York Life Insurance Co., 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440; Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583; Ettelson v. Metropolitan Life Insurance Co., 317 U. S. 188, 63 S. Ct. 163, 87 L. Ed. 176; City of Morgantown v. Royal Insurance Co., 337 U. S. 254, 69 S. Ct. 1067, 93 L. Ed. 1347; Baltimore Contractors, Inc. v. Bodinger, 348 U. S. 176, 75 S. Ct. 249, 99 L. Ed. 233.

"Amid the existing confusion of decisions it is hard to proceed with assurance; but we take it as now settled that the grant, or denial, of a stay in an action that would have been a suit in equity before the fusion of law and equity is now not appealable under § 1292(1) of Title 28; but, if the order is in an action that would have been an action at law before that time, it is appealable." *Council of Western Electric Technical Employees v. Western Electric Company*, 2nd Cir. 1956, 238 F. 2d 892.[6]

The Supreme Court has had occasion to consider the nature of condemnation proceedings. It has said:

"The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That is was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a

[6] See also Jewell v. Davies, 6th Cir. 1951, 192 F. 2d 670; Ross v. Twentieth Century-Fox Film Co., 9th Cir. 1956, 236 F. 2d 632; Cuneo Press, Inc. v. Kokomo Paper Handlers Union, 7th Cir. 1956, 235 F. 2d 108; Bernhardt v. Polygraphic Company of America, Inc., 2nd Cir. 1956, 236 F. 2d 209.

court." *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449.[7]

The order entered by the district court granted a stay in an action at law and was an appealable order under 28 U. S. C. A. § 1292(1).

In an early and celebrated opinion by Chief Justice Marshall it was said:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. * * * With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L. Ed. 257.[8]

The doctrine announced in the foregoing quotation was applied in a suit for adjudication of heirship under state law. A stay order to permit a determination of the issue in the state court was held improper. *McClellan v. Carland*, 217 U. S. 268, 30 S. Ct. 501, 54 L. Ed. 762. Such was the general rule prior to Erie-Tompkins[9] and such has

[7] The principle has been restated in Searl v. School District No. 2, 124 U. S. 197, 8 S. Ct. 460, 31 L. Ed. 415; Metropolitan Railroad Company v. District of Columbia, 195 U. S. 322, 25 S. Ct. 28, 49 L. Ed. 219.

[8] Cf. Williams v. Georgia, 349 U. S. 375, 75 S. Ct. 814, 99 L. Ed. 1161.

[9] Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.

been the general rule since Erie-Tompkins.[10] This general rule, applicable in diversity cases, is not without exception. In the case which is, perhaps, the leading and most often cited of the cases comprising the exceptions, *Railroad Commission of Texas v. Pullman Company*,[11] an injunction was sought to restrain the enforcement of an order of a state administrative body on the ground that the order was not authorized by the state law and was violative of the Federal Constitution. The District Court granted the injunction. The decree was reversed. The Supreme Court held that the District Court should have stayed its hand, reserving its decision but retaining its jurisdiction until a proceeding for a determination of the state issues could be brought in a state court. In an opinion by Mr. Justice Frankfurter, the Court noted its reluctance to decide constitutional questions and the indecisiveness of Federal determinations of questions of state law. In such a situation, it was said:

> "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." 312 U. S. 500.

Stressing the discretion vested in the courts in equitable causes and announcing the doctrine of abstention, the court observed that,

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[10] Meredith v. Winter Haven, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9; Propper v. Clark, 337 U. S. 472, 69 S. Ct. 1333, 93 L. Ed. 1480, reh. den. 338 U. S. 841, 70 S. Ct. 33, 94. L. Ed. 514.

[11] 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971.

"This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority * * *." 312 U.S. 501.

In other cases the staying of suits seeking injunctions to restrain the action or threatened action by state administrative bodies has been approved or directed.[12] The same rule furnished the guide to decision where an injunction was sought to restrain the enforcement of the Florida "Right to Work" constitutional provision,[13] where injunctions were sought to restrain the enforcement of state statutes,[14] and in a suit for a declaratory judgment construing and to enjoin the enforcement of a city ordinance.[15] A like result was reached in a suit to quiet title and for an injunction.[16] The doctrine of abstention was applied in a bankruptcy proceeding involving a question as to the extent of the bankrupt railroad's title

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[12] Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159, 49 S. Ct. 282, 73 L. Ed. 652; Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U. S. 573, 60 S. Ct. 1021, 84 L. Ed. 1368, 311 U. S. 614, 61 S. Ct. 66, 85 L. Ed. 390, reh. den. 311 U. S. 727, 61 S. Ct. 167, 85 L. Ed. 473; Alabama Public Service Commission v. Southern Railway Co., 341 U. S. 341, 71 S. Ct. 762, 95 L. Ed. 1002.

[13] American Federation of Labor v. Watson, 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873.

[14] Spector Motor Service v. McLaughlin, 323 U. S. 101, 65 S. Ct. 152, 89 L. Ed. 101; Shipman v. Du Pre, 339 U. S. 321, 70 S. Ct. 640, 94 L. Ed. 877; Government and Civic Employees Organizing Committee v. Windsor, 353 U. S. 364, 77 S. Ct. 838, 1 L. Ed. 2d 894.

[15] City of Chicago v. Fieldcrest Dairies, 316 U. S. 168, 62 S. Ct. 986, 86 L. Ed. 1355, reversing 122 F. 2d 132.

[16] Leiter Minerals, Inc. v. United States, 352 U. S. 220, 77 S. Ct. 287, 1 L. Ed. 2d 267, reh. den. 352 U. S. 1019, 77 S. Ct. 553, 1 L. Ed. 2d 560.

to a right of way.[17] Bankruptcy proceedings are inherently proceedings in equity.[18]

The pattern is consistent. All of the cases are equitable. In the Pullman case the principles of equity are shown to be the basis of the doctrine of abstention and these principles were reiterated in the Fieldcrest Dairies opinion. In a more recent case reference was made to the Spector Motor Co., Fieldcrest Dairies, Pullman and Magnolia cases, and of them it was said:

> "The cases mentioned above where this Court require submission of single issues, excised from the controversy, to state courts were cases in equity. The discretion of equity as to the terms upon which it would grant its remedies, in the light of our rule to avoid an interpretation of the Federal Constitution unless necessary, was relied upon to justify a departure from normal procedure. * * *
>
> "The submission of special issues is a useful device in judicial administration in such circumstances as existed in the *Magnolia*, *Spector*, *Fieldcrest* and *Pullman* cases, supra, but in the absence of special circumstances, [Meredith v. Winter Haven] 320 U. S. at 236, 237, it is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy." *Propper v. Clark*, 337 U. S. 472, 491, 492.

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[17] Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 60 S. C
628, 84 L. Ed. 876, 42 A.B.R.N.S. 216.

[18] Local Loan Co. v. Hunt, 292 U. S. 234, 54 S. Ct. 695, 78 L. E
1230, 93 A.L.R. 195, 24 A.B.R.N.S. 668; Texas Co. v. Miller, 5
Cir. 1947, 165 F. 2d 111, cert. den. 333 U. S. 880, 68 S. Ct. 9
92 L. Ed. 1155.

While the doctrine of abstention has been applied only in equity cases, including the Magnolia case in bankruptcy, it does not, of course, follow that equity jurisdiction alone is enough to warrant the use of the doctrine.[19] In the Meredith case, where declaratory and injunctive relief was sought, it was stated:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. [Citing cases] When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely become the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act. The exceptions relate to the discretionary powers of courts of equity. An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. [Citing authority]. Exercise of that discretion by

[19] Meredith v. Winter Haven, note 10.

those, as well as by other courts having equity powers, may require them to withhold their relief in furtherance of a recognized, defined public policy." *Meredith v. Winter Haven*, 320 U. S. 228, 234, 235.

The expropriation proceeding from which this appeal stems is not one where equitable jurisdiction and the discretion incident to such jurisdiction are present. Nor do we find present any such exceptional circumstances as would require or permit the district court to delay its determination of the case pending a state adjudication of state issues, even if there was an equitable discretion which might be exercised.

The order of the district court is reversed and the cause is remanded.

REVERSED AND REMANDED.

APPENDIX B.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,870

CITY OF THIBODAUX,
Appellant,

versus

LOUISIANA POWER & LIGHT COMPANY,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(July 15, 1958.)

ON PETITION FOR REHEARING.

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

PER CURIAM, IT IS ORDERED That the opinion of this Court be and it is hereby amended and modified in the following respects:

1. The second and third sentences of the first paragraph on page 9 of the opinion of this Court are hereby amended so as to read:

> "The cases are usually equitable. In the Pullman case the principles of equity are declared to be the basis of the doctrine of abstention and these principles were reiterated in the Fieldcrest Dairies opinion."

2. The first sentence of the last paragraph beginning on page 9 of the said opinion is hereby amended so that the same shall read:

> "While the doctrine of abstention has been applied usually in equity cases, including the Magnolia case in bankruptcy, it does not, of course, follow that equity jurisdiction alone is enough to warrant the use of the doctrine." Cf. *Meredith v. Winter Haven, supra.*

3. The first paragraph on page 11 of the said opinion is hereby amended so that the same shall read:

> "The expropriation proceeding from which this appeal stems is not one where equitable jurisdiction and the discretion incident to such jurisdiction are present. Nor do we find present any such exceptional circumstances as would require or permit the district court to delay its determination of the case pending a state adjudication of state issues."

With the opinion thus amended and modified, the petition for rehearing is hereby DENIED.

APPENDIX C.

28 U.S.C. § 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. § 1292:

"The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

"(4) Judgments in civil actions for patent infringement which are final except for accounting."

Rule 42 (b), Federal Rules of Civil Procedure:

"Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

APPENDIX D.

Opinion of Attorney General, State of Louisiana, October 10, 1951:

"Mr. Earl Applewhite,
Electric and Water Department Manager,
Town of Winnfield,
Winnfield, Louisiana.

"The following factual situation is presented in your letter to the Attorney General, bearing date of October 5, 1951:

"The Town of Winnfield owns and operates an electricity and water distribution system. The Louisiana Light and Power Company runs its electric power lines across the northwestern area of said town and furnishes electric service to the residents of such area. The territory over which the lines of said company run was located outside the incorporated limits of said town when first said lines were installed; now, however, said territory has been brought within the incorporated municipal limits.

"After explaining the reasons which prompt action of some character by the governing authority of the municipality, you ask, first, what might be done legally to bring about an amicable acquisition of the Louisiana Light and Power Company's power lines and electricity distribution system that are located within the town; and second, in default of amicable acquisition, whether such acquisition

could be accomplished by expropriation proceedings.

"When the lines, equipment, and facilities of the company were installed, the area involved was located in Winn Parish, outside the municipal limits of Winnfield. With full authority to act, the police jury granted a limited franchise to the Company. It is our view, therefore, that the company's franchise, though limited, constitutes a vested right, no matter that the territory traversed by the company's lines and system now lies within the corporate limits of the town, and that any acquisition of such lines, equipment and other property of the system, short of an amicable transfer, would violate the constitutional rights of the company.

"A municipality has the same legal right to acquire a public utility as it does to construct a new one or to extend and improve an existing one; therefore, we see no reason why an amicable purchase of the Louisiana Power and Light Company's system within the area may not be effected. It should be borne in mind, however, that if any bonds are outstanding on the town's presently existing electricity and water distribution plant, equipment and facilities, no action should be taken prejudicial to the rights of the bondholders in bringing the Louisiana Power and Light Company's system within that which is owned and operated by the municipality.

"Presumably, revenue would have to be raised beyond the current cash resources of the town

to effect the purchase. Your attention is accordingly directed to Article XIV, Section 14(m) of the Louisiana Constitution, relative to the issuance of bonds for the purpose of constructing, acquiring, extending or improving any revenue producing public utility.

"In default of amicable purchase, we do not believe that the right of expropriation would lie. Pretermitting other considerations that might negate such right, we advise you that the right of expropriation relates to lands. This right does not extend to movables, facilities, equipment, etc. Even if certain structures along the company's right-of-way are classified as immovables by nature, and even if certain equipment and permanently attached movables forming a part of the physical layout are classified as immovables by destination, it must be borne in mind that all such elements are a part of a system, and the municipality can no more expropriate a public utility distribution system than it can expropriate a franchise validly issued at its inception by the police jury.

JOHN L. MADDEN"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 356

LOUISIANA POWER & LIGHT COMPANY,

Petitioner,

vs.

CITY OF THIBODAUX,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

FERD F. GANGEMI,
Special Counsel,
622 North Boulevard,
Baton Rouge, La.;
LOUIS FERNEL LABOUISNE,
Special Counsel,
808 Maritime Building,
New Orleans 12, La.;
REMY CHIASSON,
City Attorney,
City Hall,
Thibodaux, La.;
Attorneys for Respondent.

INDEX.

CITATIONS.

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 398

LOUISIANA POWER & LIGHT COMPANY,
Petitioner,

versus

CITY OF THIBODAUX,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The City of Thibodaux, through undersigned counsel, prays that the Petition of Louisiana Power & Light Company for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this matter be denied.

QUESTIONS PRESENTED.

Referring to the statement of questions presented for review in the Petition (p. 2), the following corrections are indicated:

1. The phrasing of the first "Question" should make it clear that the stay order is to remain in effect until the **highest appellate court** of the state has inter-

preted the statute involved, and that **no case is presently pending in any state court** which might give occasion for such an interpretation. Further, it is conceded that the order from which respondent appealed is not a "final decision" within 28 U. S. C. 1291, the only question presented being whether it amounts to an "interlocutory order . . . granting . . . an injunction" under 28 U. S. C. 1292(1).

2. The second "Question," as propounded in the Petition, is **not presented** to this Court. Respondent concedes the inherent right of a District Court of the United States, whether in a case at law or in equity, to stay proceedings "in order to control the progress of the cause before it in orderly manner," but submits that its exercise is subject to review when discretion is abused.

3. This "Question" is correctly stated.

STATUTES INVOLVED.

As noted, 28 U. S. C. 1291, governing appeals from "final decisions" of the district courts, is not invoked in this proceeding. The relevancy of Rule 42(b) of the Federal Rules of Civil Procedure, supported only by the paragraph of Argument appearing on page 18 of the Petition, is dubious. Though not mentioned under this head, Petitioner also appends (Appendix D, pp. 35-37) an Opinion of the Attorney General of Louisiana, which is of no interest at this stage of the proceeding. Respondent would add to the list of "Statutes Involved" 28 U. S. C. 1651(a), the so-called "All Writs" statute, which, while only indirectly invoked, is perhaps best included. It reads as follows:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT.

The "Statement" printed in the Petition (p. 3 *et seq.*) should be corrected in the following particulars:

(a) The assertion that Respondent had on several occasions recognized the right of Petitioner to serve areas successively brought within the City limits has no place in the statement of the case. That allegation, supported only by an affidavit annexed to Petitioner's "Memorandum" in the District Court, is not admitted. The only facts before this Court are those set forth in the Stipulation entered into by the parties before the District Court.

(b) Petitioner's "Statement" is misleading in characterizing the issues submitted to the District Court for decision as "certain of the defenses set forth in Petitioner's answer" (Petition, p. 3). In fact, **all legal** defenses were argued, briefed, and submitted to the District Court, leaving only the issue of just compensation open had the Judge ruled in Respondent's favor on the matters before him. (R. p. 23).

(c) The purported summary of the holding of the Court of Appeals at the end of the "Statement" (pp. 5-6) is inaccurate. As amended by the Per Curiam issued on the denial of a rehearing, the Opinion of the Court of Appeals does **not** deny the inherent "power or discretion" of a district court to stay proceedings before it in an action at law. It merely finds that, in this instance, there

were no such exceptional circumstances as would justify the District Court's exercise of that power.

ARGUMENT.

May It Please the Court:

In order to bring itself within the criteria for certiorari suggested by Rule 19 of this Court, Petitioner alleges that the decision complained of is in conflict with a decision of another panel of the same Court of Appeals, with decisions of other United States Courts of Appeals, and with decisions of this Court. Petitioner adds that the questions presented are of "fundamental importance . . ." (Petition, p. 6). If all this were true, no doubt certiorari should be granted. But, we submit, the purported "conflict" disappears when the decision of the Court of Appeals is restricted to the actual holding necessary to the result reached, and the significance of the issue of appealability, at least, is greatly exaggerated.

First Holding—Appealability of Stay Order.

Conflict in Decisions.

If the holding of the Court of Appeals in this matter had been, as Petitioner represents, that **any stay order whatever, no matter how restricted or temporary,** entered in a proceeding at law, so far amounts to an injunction as to be appealable under 28 U. S. C. 1292(1), then, there would indeed exist a conflict with decisions both in the Fifth Circuit and in other Circuits, and perhaps even with the *dictum* of this Court in *Enelow v. New York Life Insurance Company*, 293 U. S. 379, at 381 (quoted in the Petition, p. 11). The Court of Appeals

in its Opinion, it is true, failed to characterize precisely the stay order here in question, merely approving a very general statement by Judge Learned Hand for the Second Circuit Court of Appeals (Petition, pp. 23-24). But it is not to be surmised, forasmuch, that the Court meant to endorse such a broad propocition as Petitioner reads in the decision, nor was such a sweeping holding necessary to the conclusion reached.

The precise ruling here was that, in an **expropriation proceeding** where **time is of the essence,** an appeal would lie from a stay order which delayed **indefinitely** resolution of issues properly before the court until the interpretation of a statute could be obtained from the **highest appellate tribunal** of the state, at a time when **no action had yet been instituted** which would afford the state courts an opportunity to make the required clarification, and it was possible, if not probable, that **the state supreme court would never have such an occasion for interpretation** (since the complainant might win in the state trial court and be unable to appeal from a favorable decree and the defendant would likely prefer not to appeal, thus producing a stalemate). Contrast this with the decisions offered as conflicting:

U. S. v. Richardson (USCA-5th C., 1953), 204 F. (2d) 552 (Petition, pp. 7-9):

In this case the District Court, impatient with the Government's refusal to obey its order to make the Secretary of the Army available for a deposition requested by the defendant, **temporarily** halted expropriation proceedings until compliance was effected. In refusing to entertain an appeal from this stay the Court of Appeals

emphasized that the appellant **itself held the key to its prison,** saying (at p. 556): ". . . the alleged unfortunate predicament is of its own making . . ."

United States v. Horns (USCA-3rd C., 1945), 147 F. (2d) 57 (Petition, pp. 12, 17):

Here the defendant in a criminal prosecution for violating O. P. A. ceiling prices was denied an appeal from a **refusal** to stay proceedings against him **temporarily** pending the outcome of a protest **already filed** by him with the Administrator.

Cover v. Schwartz (USCA-2nd C., 1940), 112 F. (2d) 566 (Petition, pp. 13, 17):

The stay order from which an appeal was disallowed in this case was, again, merely **temporary.** A patent infringement suit was delayed pending the decision of a controversy between the same parties over the same patent **already submitted** to the Court of Customs and Patent Appeals. As the Court of Appeals remarked of the order there complained of: "It affects only the time of trial and amounts to nothing more than a continuance."

United Gas Pipe Line Company v. Tyler Gas Service Company (USCA-5th C., 1957), 247 F. (2d) 681 (Petition, pp. 14, 17):

Here the stay held unappealable was issued by the District Court in a proceeding to recover increased rates pending the determination of a case **already on appeal** testing the propriety of those same rates. Moreover, the Court of Appeals implied that it looked with disfavor on the appeal because it appeared to be a delaying tactic by

one of the parties to a controversy that had already been in litigation more than five years.

Wilson Brothers v. Textile Workers Union of America (USCA-2nd C., 1955), 224 F. (2d) 176 (Petition, p. 15):

The stay order here having been entered in a suit **in equity,** Petitioner does not cite it directly in support of the proposition put forward. Indeed, it is well established that the stay of an equitable action is **never** appealable. But it is interesting to note that the Court of Appeals in this case opines that an appeal would lie if the order referring the parties to arbitration had been entered in an action at law.

Day v. Pennsylvania Railroad Company (USCA-3rd C., 1957), 243 F. (2d) 485 (Petition, p. 17):

In this case the appeal dismissed was from a stay order **temporarily** postponing a suit for wages until similar claims **already filed** against the same defendant were adjudicated by the National Railroad Adjustment Board. Even so, the appellate court here recognized the possibility of undue delay and "suggested" a relaxation of the stay to permit pre-trial procedures.

The decisions just examined illustrate the recognized rule that a trial court, whether sitting at law or in equity, may properly "regulate the course of the action before it," or, in different words, "control the progress of the cause so as to maintain the orderly processes of justice," and that rulings made to this end are not immediately appealable. The rationale of these cases is so

obviously sound that it is surprising to find imputed to the members of the panel of the Court of Appeal who decided the instant case, or to Judge Learned Hand, any intention to disagree with their holding. Indeed, as Petitioner points out, Judge Hutcheson concurred in one of these decisions *(U. S. v. Richardson, supra)*, and Judge Hand in another *(Cover v. Schwartz, supra)*. The clear answer is that there is no conflict. The decision here complained of allowed an appeal from an order the effect of which was far more drastic than a judge's "ruling as to the manner in which he will try one issue in a civil action pending before himself" (see *Morgantown v. Royal Insurance Company*, 337 U. S. 254, at p. 257); it was, in all but name, an injunction, indefinitely delaying, and perhaps ultimately denying, the complainant a resolution of his case.

The rule here suggested as evolving from the decisions of the Courts of Appeals, **that a stay order entered in proceedings at law is appealable when it is, in effect, an injunction, but is not appealable when it amounts merely to a temporary continuance of the case,** in no way conflicts with the pertinent decisions of this Court. It is true the Supreme Court has not had occasion to clearly mark this distinction, but it was at least sketched in the *Enelow* Opinion, *supra* (see Petition, p. 11). In any event, the **instant decision** cannot be said to conflict with the holdings of this Court, since in each of the three cases before it involving a stay of proceedings at law the Supreme Court held the granting or denial of the order appealable. *Enelow v. N. Y. Life Co., supra; Shanferoke Co. v. Westchester Co.*, 293 U. S. 449; *Ettelson v. Metro. Ins. Co.*, 317 U. S. 188. This Court's decisions in *Morgan-*

town v. Royal Ins. Co., 337 U. S. 254 (Petition, p. 16), and *Baltimore Contractors v. Bodinger*, 348 U. S. 176 (Petition, p. 16), are not pertinent to the issue, the holding of both being only that a stay order entered in a **suit in equity,** as distinguished from an action at law, is not appealable. Nor is *Catlin v. United States*, 324 U. S. 229, cited by Petitioner (p. 7), in point. No stay order was there involved; the question was whether an *ex parte* judgment decreeing title passed to the condemnor in expropriation proceedings and the denial of a motion to set aside that judgment were appealable as "final decisions" under Section 128 of the Judicial Code (now 28 U. S. C. 1291), issues not presented in the instant case.

Importance of the Issue.

We submit Petitioner somewhat exaggerates the importance of the first question presented. But, in any event, **in the instant proceeding,** the appealability of the stay order entered does not constitute a sufficiently serious issue to warrant consideration by this Court on certiorari. Indeed, even if the Court of Appeals should not have considered the matters brought before it by way of appeal, it could, and should have, **reached the same result by granting a writ of mandamus** directed to the District Court.

It is now well settled that, since the case would eventually be subject to its appellate jurisdiction, the Court of Appeals had the **power,** under 28 U. S. C. 1651(a) *(supra,* p. 3), to issue mandamus to compel the withdrawal of an interlocutory order erroneously entered in the cause. *LaBuy v. Howes Leather Co.*, 252 U. S. 249. Nor is there any doubt that a district court's refusal to decide a controversy properly before it **justifies the exer-**

cise of that discretionary power. *McClellan v. Carland*, 217 U. S. 268. Respondent having requested the Court of Appeals, if it could not entertain an appeal, to consider the papers filed as a petition for mandamus, that Court could have reviewed the District Court's decision on such a writ. See *Travelers' Protective Ass'n v. Smith* (USCA-4th C., 1934), 71 F. (2d) 511; *Magnetic Engineering and Manufacturing Co. v. Dings Manufacturing Co.* (USCA-2nd C., 1950), 178 F. (2d) 866; *International Nickel Co. v. Martin J. Barry, Inc.* (USCA-4th C., 1953), 204 F. (2d) 583; *Lyons v. Westinghouse Electric Corporation* (USCA-2nd C., 1955), 222 F. (2d) 184. Accordingly, should this Court reverse on the question of appealability, the Court of Appeals could still reach the same result by granting mandamus. Under the circumstances, we respectfully suggest this Court should not grant certiorari to review the "First Holding," even if it feels error may have been committed.

Second Holding—Propriety of Stay Order.

As we have already noted, the second question before this Court is **not** whether the District Court had the inherent power to issue the stay order, but, rather, **whether the Court abused its discretion in this instance.** The Petition contains not a single word of argument on this issue. Indeed, that part of the Argument labelled "Second Holding . . ." is almost entirely devoted to the question of appealability (pp. 11-18), and the few paragraphs touching the issuance of the order confine themselves to asserting the inherent right of a district court to issue a stay in proceedings at law (Petition, pp. 9-11), a proposition already conceded by Respondent.

Under these circumstances, we think it improper to burden the Court, at this point, with an argument in support of the Court of Appeals' ruling vacating the stay order. Suffice it to note that no conflict has been shown, and none exists, between the decision complained of and the decisions of this Court, or of other Courts of Appeals, on this question. The present stay order was not entered in an equitable case in which the court had discretion to refuse to decide, nor was it justified by "exceptional" or "special" circumstances. See *Meredith v. Winter Haven*, 320 U. S. 228; *Propper v. Clark*, 337 U. S. 472.

CONCLUSION.

For the foregoing reasons, Respondent prays that the Petition for Certiorari filed herein be denied.

Respectfully submitted,

THEO. F. CANGELOSI.
Special Counsel,
612 North Boulevard.
Baton Rouge, La.;

LOUIS FENNER CLAIBORNE,
Special Counsel,
304 Marine Building,
New Orleans 12, La.

REMY CHIASSON,
City Attorney,
City Hall,
Thibodaux, La.;

Attorneys for Respondent.

CERTIFICATE OF SERVICE.

I hereby certify that copies of the foregoing brief have been served on Peltier & Peltier, Harvey Peltier, and Monroe & Lemann, J. Raburn Monroe, the attorneys for Louisiana Power & Light Company, petitioner, by depositing the same, properly addressed, first class postage prepaid, in the United States Mail, on this ... day of October, 1958.

SUBJECT INDEX.

AUTHORITIES CITED.

MISCELLANEOUS.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 398

LOUISIANA POWER & LIGHT COMPANY,
Petitioner,

versus

CITY OF THIBODAUX

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR LOUISIANA POWER & LIGHT COMPANY.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 62, 79), is reported at 255 F. (2d) 774. The opinion of the District Court (R. 49) is reported at 153 F. Supp. 515.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 15, 1958 (R. 80). The petition for a writ of certiorari was filed on September 25, 1958, and was granted on November 17, 1958 (R. 81). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1). The jurisdiction of the District Court rests on diversity of citizenship, Plaintiff being a citizen of Louisiana, and Defendant being a citizen of Florida.

QUESTIONS PRESENTED AS TO WHICH CERTIORARI GRANTED.

1. Does a United States District Court have the inherent power in a case at law to exercise the discretion of staying proceedings in order to control the progress of the cause before it in an orderly manner?

2. Assuming that a United States District Court does have discretion to stay proceedings in order to control the progress of a law case before it in an orderly manner, did the District Court abuse that discretion?

STATUTES INVOLVED.

28 U.S.C. 1291; 28 U.S.C. 1292 (1); Rule 42 (b) of the Federal Rules of Civil Procedure; Louisiana Revised Statutes, Title 19, § 105. They are printed in Appendix "A", *infra*, pp. 22-23.

STATEMENT.

Louisiana Power & Light Company has provided electric service to the Parish of Lafourche for many years by virtue of non-exclusive franchises granted by that par-

ish. (R. 27, 30, 32). The City of Thibodaux (herein referred to as the "City") is located in Lafourche Parish. Petitioner operates an integrated electric system generating current at central generating stations at points remote from the Thibodaux area here involved, so that the facilities used by Petitioner to serve this area are located not in this area alone but at points all the way from this area back to the central station. *In re Middle South Utilities, Inc., et als.*, 35 S. E. C. 1. Although the City had extended its limits several times during recent years, it had recognized the non-exclusive right of Petitioner to serve the customers within areas of Lafourche Parish which had been incorporated into the City after Petitioner had started serving these areas. (R. 36). However, on February 4, 1957, the City instituted an action supposedly under the authority of Louisiana Act 111 of 1900 (Louisiana Revised Statutes, Title 19, § 101, *et seq.*) in the Seventeenth Judicial District Court of Louisiana, seeking to expropriate not only some of Petitioner's property in these areas, but also all of Petitioner's rights to serve in these areas. (R. 5-8). The City has for many years operated its own municipal electric system but its rates for service are 58.5% higher than those of Petitioner (R. 24). Petitioner removed the suit to the United States District Court for the Eastern District of Louisiana on February 14, 1957 (R. 1). Thereafter, Petitioner answered the complaint, interposing *inter alia* defenses (none of them equitable) involving the United States Constitution, the Louisiana Constitution, certain Louisiana Statutes, and an order of the Louisiana Public Service Commission. Argument was heard upon Petitioner's above-mentioned defenses on June 21, 1957, subsequent to which the District Court (Judge J. Skelly Wright) issued an interlocutory or-

der staying further proceedings "until the Supreme Court of Louisiana has been afforded an opportunity to interpret Act 111 of 1900". (R. 52).

The City Appealed from this order to the United States Court of Appeals for the Fifth Circuit and, on April 18, 1958, that Court reversed and remanded the cause to the District Court. Upon petition for rehearing, the Court of Appeals denied same on July 15, 1958, amending and modifying the original opinion only insubstantially.

SUMMARY OF ARGUMENT.

I.

The principal vice contained in the opinion of the Court of Appeals stems from an erroneous view as to the powers and functions of a Federal District Court, particularly in a situation where there is an interplay between Federal and State judicial relationships, and, even more particularly, where the interplay involves questions of applicability and State constitutionality of hitherto uninterpreted State statutes.

The Court below fell into this error by not following the jurisprudence, and the reasoning thereof, in connection with stays of proceedings. The Court of Appeals determined, first of all, that there was a distinction between stay orders in cases arising out of an equity genesis as opposed to those arising out of law. Having made this distinction, the Court then over-simplified the matter by concluding that the difference between these equity and law matters involved "discretion" and that only in equity cases would the District Court have "discretion" to grant a stay.

Such a conclusion overlooks the jurisprudence, and reasoning, of this Honorable Court and the several Circuits which have accorded themselves with the decisions of this Court.

Although there has been some meandering, particularly in one or two of the Circuits, it has become established that a District Court, in a matter premised in law, does have power to stay proceedings before it as a matter of orderly control of the progress of the cause before it.

II.

If this Court should conclude in accordance with the statement above, that a District Court does have the inherent power to exercise the discretion of staying proceedings in a law matter, then it becomes necessary to inquire into whether or not the District Court here abused that discretion.

The Petitioner, in answer to this expropriation complaint, raised numerous questions involving local law, including the applicability and the validity under the Louisiana Constitution of the statute upon which this suit was based. The statute forming the basis for this suit is fifty-eight (58) years old and has never been interpreted or discussed by any State or Federal Court, and as far as Petitioner can determine, no suit has ever been instituted under its purported authority. The only writing touching upon the subject at hand is an opinion of the Attorney General of the State of Louisiana, rendered October 19, 1951, advising that a city may not expropriate a part of a utility system in an area recently acquired by extension of the city limits for the purpose of adding those facilities

to the presently existing municipally operated utility. In addition, the statute provides that there shall be no suspensive appeal, which provision would have the effect of causing the loss to Petitioner of its title and interest to the property and rights vested in it before there had been a final judgment in the matter.

With the case in the posture set forth above, the District Court exercised its inherent power to stay these proceedings until such time as the processes of the Louisiana Declaratory Judgment Act could be used and a definitive interpretation and testing of the subject statute obtained. This exercise of inherent power was clearly within the limits of permissible discretion.

ARGUMENT.

I.

Does a United States District Court Have the Inherent Power in a Case at Law to Exercise the Discretion of Staying Proceedings in Order to Control the Progress of the Cause Before it in an Orderly Manner?

The City of Thibodaux has not at any time questioned the proposition that the stay order here involved is not a "final decision" within the meaning of 28 U.S.C. § 1291. On the other hand, the City has contended that this plainly interlocutory order falls within the ambit of 28 U.S.C. 1292 (1), basing this claim on the theory that the stay order amounted to an injunction, the above-cited section reading as follows:

> "The Courts of Appeals shall have jurisdiction of appeals from . . . interlocutory orders of the District

Courts of the United States . . . granting . . . injunctions. . ."

Hence, says the City, this stay order, being an injunction, was appealable under Section 1292 (1). On the other hand, Petitioner urges that the stay order is interlocutory, not final, and therefore not appealable under Section 1291, and, further, that the stay order does not amount to an injunction, but is, instead, an exercise by the District Court of its inherent power to control the progress of the cause before it, and is not appealable.

Although the language of the opinion is not altogether clear, it appears that the Court of Appeals has held here that the District Court had no authority or right to stay this proceeding pending a determination in the State Courts of State issues, the basis for such holding being that the matter was born of law rather than equity. (R. 80).

In 1935, this Court decided the case of *Enelow v. New York Life Insurance Company*, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440, and at that time made quite clear that it considered there to be a wide distinction between interlocutory orders which involve the exercise of equitable jurisdiction and mere stays of proceedings in courts of law. That case involved an action at law upon a policy of life insurance which was originated in a State Court and removed to Federal Court. The defendant there set up affirmative defenses of fraud and prayed for cancellation of the insurance policy. The defendant then moved that there be a hearing on the equitable portion of its defenses in advance of the trial of the purely legal issues. The District Court granted this request, the Court of Appeals affirmed

the District Court's action, and this Court granted a writ of certiorari.

This Court reversed the Courts below, finding *inter alia* that there was an exercise by the District Court of equitable jurisdiction. The ruling of significance here which results from the *Enelow* case is that by which this Court made it unarguably clear that there was a distinction between interlocutory orders constituting an exercise of equitable jurisdiction in granting or refusing an injunction and those orders which constitute a mere stay of proceedings in a Court of law, in the following language:

> "This section contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, **as distinguished from a mere stay of proceeding which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. . . .**" (Emphasis added).

This above quoted pronouncement as to the powers of a District Court acting in a law matter and the appealability of stay orders in such cases, should be so clear that even those running may read. For the most part, this principle has been observed. Perhaps the most lucid analysis of the meaning of the *Enelow* case emanates from the Third Circuit in *United States v. Horns*, 147 F. (2d) 57. In that case, there was an appeal from an order of the District Court denying a motion for stay of criminal proceedings in order to allow the defendants to obtain a determination of a protest against certain regulations of the

Price Administrator. In passing upon the question of appealability of this denial of a stay, the Court said:

> "In the Enelow case the Supreme Court, however, made it clear that **if a court of law itself grants a stay in proceedings before it** or a court of equity grants a stay in proceedings before it **the stay is not an injunction. In such a case the stay is granted by virtue of the court's inherent power to control the progress of the cause pending before it so as to maintain the orderly processes of justice.** It is only when the power possessed by a court of equity to stay proceedings in another court is exercised that the court's action amounts to the grant or refusal of an injunction. This distinction was stressed in Cover v. Schwartz, 2 Cir., 1940, 112 F. (2d) 566, and is controlling here." (Emphasis added).

Although Judge Learned Hand later went astray, as pointed out *infra*, in the case of *Cover v. Schwartz*, 112 F. (2d) 566, he was part of the panel which had this to say about the *Enelow* case:

> "The Supreme Court in Enelow v. New York Life Insurance Company, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440, discussed the effect of Section 129 and **pointed out the distinction between mere stays which a court of law as well as a court of equity may grant by virtue of inherent power to control the progress of a cause pending before it in furtherance of orderly processes of justice, on the one hand, and injunctions given by a court of equity, on principles peculiar to equity, to stay proceedings**

in another cause pending before the same court or before another court, on the other hand. It was held that an order made under Section 274b of the Judicial Code, 28 U.S.C. sec. 398, 28 U.S.C.A. Sec. 398, staying further progress on an action at law until after the trial of an equitable defense, was in substance an injunction, to the same extent as if the court had acted under the older procedure of a separate suit in equity, and was appealable by reason of Section 129. Shanferoke Coal & Supply Corporation v. Westchester Service Corporation, 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583, is to the same effect. In the present case the order which aggrieves the plaintiff is merely a temporary stay imposed by the district court as part of its control over the cause pending before it." (Emphasis added).

Strangely enough, the very Circuit from which this instant appeal is pending has recently placed itself in accord with the principle of the *Enelow* case. In *United Gas Pipe Line Company v. Tyler Gas Service Company*, 247 F. (2d) 681, the Fifth Circuit had before it an appeal from a stay order granted to the defendant until determination of a pending appeal by the defendant of a rate increase. The Fifth Circuit held that the stay was not an injunction, employing this language:

"United filed a double-barreled affair here. It contended that the stay by the judge of further proceedings in the action in his own court amounted to an injunction or restraining order from which under the Code, 28 U.S.C.A. Sec. 1292 (1), an ap-

peal lies even though interlocutory. **As to this, we do not think this was such an order. It related solely to the conduct of the suit itself. It did not purport to forbid action by anyone, court or litigant, in any other place or proceeding. It was purely a control of certain phases of that particular lawsuit.** Confessedly an interlocutory order, there is no basis for an appeal unless, as this is not, this was an injunction. (Citing numerous cases). United's appeal must therefore be dismissed." (Emphasis added).

The only cases which appear to be in conflict with the principle that a District Court has inherent power to grant a stay in order to control the progress of a cause pending before it, strangely enough, came out of the very same Circuits responsible for the *United Gas* case and the *Cover* case. These two conflicting cases are *Council of Western Electric Technical Employees v. Western Electric Company*, 238 F. (2d) 892, and the instant case. Neither case, it seems to us, is capable of being logically distinguished and can only be consigned to the limbo of error stemming from efforts to over-simplify the principles involved. Thus, Judge Hand, in the *Western Electric* case, sought to give birth to a rule that stays in actions which are grounded in equity are not now appealable under 28 U.S.C. 1292 (1) but that, on the other hand, stay orders in actions at law are appealable. This attempt at easy categorization not only goes far beyond the *Enelow* decision, but in fact, travels on a 180-degree course away from the *Enelow* principle. We submit that the *Enelow* case stands for nothing more nor less than that a Court in a law matter has the power to issue a stay order which would not

be appealable, where the stay order is but a step in the control of the orderly progress of the cause before it.

Contrary to the *Western Electric* case, we believe that the presently existing and proper rule in connection with this issue is that a District Court has the inherent power to control the progress of a cause **pending before it** in furtherance of the orderly processes of justice, and such a stay order in a law matter would be appealable **only** if its issuance is beyond the District Court's discretion as a Court of law in so controlling the proceedings and would necessarily require for its justification the exercise of the District Court's equitable powers, in which event the District Court would then be found to be acting as an Equity Chancellor staying a proceeding in a law matter.[1] This latter view, we suggest, is in accord with the language of the following cases:

Baltimore Contractors v. Bodinger, 348 U. S. 176:

> "Whether the District Court was right or wrong in its ruling that the contract provision did not require arbitration proceedings, **it was simply a ruling in the only suit pending, actual or fictional.**" (Emphasis added).

Morgantown v. Royal Insurance Company, 337 U. S. 254:

> "This is not a situation where a 'chancellor' in denying a demand for jury trial can be said to be enjoining a 'judge' who has cognizance of a pending

[1] Petitioner raised no equitable defenses in its answer and no injunction or other equitable relief was sought, suggested or inferred in Petitioner's pleading, oral argument, or otherwise. The stay order here was solely and simply an act **sua sponte** on the part of the District Court.

action at law. **This is rather a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself.** . . . The fiction of a court with two sides, one of which can stay proceedings in the other, is not applicable where there is no other proceeding in existence to be stayed." (Emphasis added).

United States v. Horns, supra:

". . . if a court of law **itself** grants a stay in proceedings before it . . . **the stay is not an injunction.** In such a case the stay is granted by virtue of the court's inherent power to control the progress of the cause **pending before it** so as to maintain the orderly processes of justice." (Emphasis added).

Cover v. Schwartz, supra:

"In the present case the order which aggrieves the plaintiff is merely a temporary stay imposed by the district court as part of **its** control over the cause pending before it." (Emphasis added).

United Gas Pipe Line Company v. Tyler Gas Service Company, supra:

"As to this, we do not think this was such an order. It related solely to the conduct of **that suit itself.** It did not purport to forbid action by anyone, court or litigant, **in any other place or proceeding.** It was purely a control of certain phases of **that particular lawsuit.**" (Emphasis added).

In sum of this point of argument, it seems entirely appropriate to set forth the language of the Third Circuit in the

case of *Day v. Pennsylvania Railroad Company*, 243 F. (2d) 485, a case involving an action by a retired locomotive engineer against the railroad for extra pay allegedly due under a collective bargaining agreement, wherein the District Court entered an order retaining jurisdiction but staying all proceedings until the National Railroad Adjustment Board had decided certain cases involving the same issue. From that order the plaintiff engineer appealed and the Third Circuit said:

> "We are satisfied that under these circumstances the stay order of the district court was not an injunction based on an equitable defense or counterclaim but **merely a regulation of the course of the action itself.** The Supreme Court in Enelow v. New York Life Insurance Company, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440, made it clear that such a stay of proceedings is not an injunction but is granted by a court 'in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice.' The same distinction was recently reiterated by the Supreme Court in Baltimore Contractors v. Bodinger, 348 U. S. 176, 75 S. Ct. 249, 99 L. Ed. 233, when the court said with respect to an order staying proceedings pending arbitration:
>
> > " 'This ruling was a step in controlling the litigation before the trial court, not the refusal of an interlocutory injunction'."

Simply as a postscript and parenthetically, it seems rather obvious that if the District Court does not have the

discretion which we contend for here, then Rule 42 (b) of the Federal Rules of Civil Procedure, providing for separate trials of any separate issues is meaningless since that Rule manifestly contemplates an exercise of similar discretion by a District Court.

II.

Assuming That a United States District Court Does Have Discretion to Stay Proceedings in Order to Control the Progress of a Law Case Before it in an Orderly Manner, Did the District Court Abuse That Discretion?

Since, as shown above, the District Court did have the power in its discretion to stay proceedings in this matter, we accordingly turn now to the question of whether or not it abused that discretion in its stay order. In order to consider this question, it is necessary to examine the stage of proceedings at the point of issuance of this stay order.

(a) The District Court had before it an expropriation complaint based upon a statute which had never been interpreted or discussed by any State or Federal Court during the fifty-seven (57) years of its existence.

(b) The answer raised defenses as to the following matters:

(1) The validity of the action under Article I, Section 2 of the Louisiana Constitution. (R. 14.

(2) The validity of the action under Article XIX, Section 14 of the Louisiana Constitution. (R. 15).

(3) The validity of the action under Article XIII, Section 6 of the Louisiana Constitution. (R. 15).

(4) The validity of the action in connection with an order of the Louisiana Public Service Commission, dated June 16, 1953. (R. 15, 40).

(5) The interpretation of Louisiana Revised Statutes, Title 19, § 101, *et seq.*, as to whether it authorized the remedy sought by the expropriation suit. (R. 15, 17, 18).

(6) If valid under interpretation of State law, the validity of the action under the Constitution of the United States.

Thus, the answer placed at issue numerous questions of interpretation of local law, as well as questions under the United States Constitution for consideration if the action were valid under local law.

(c) Louisiana Revised Statutes, Title 19, Section 105, one of the sections of the statute upon which this action was based, precludes any suspensive appeal from a judgment of the lower court and provides no remedy to the property owner in the event that an appellate court were to reverse a judgment of taking.

(d) The Attorney General of the State of Louisiana had rendered an opinion on October 10, 1951, advising that a city may not expropriate a part of a utility system in an area recently acquired by extension of the city limits for the purpose of adding those facilities to the presently existing municipally operated utility. (Appendix "B" hereto).

(e) The State of Louisiana has a Uniform Declaratory Judgment Act which provides for a declaration of rights through interpretation of questioned statutes. (Louisiana Revised Statutes, Title 13, Section 4231, *et seq.*).

It was in this posture that the District Court issued its stay order, until such time as an interpretation of Act 111 of 1900 had been obtained through State Court proceedings. It is quite apparent that the District Court considered the question of its discretion inasmuch as it cited the case of *Leiter Minerals, Inc., v. United States*, 352 U. S. 220, at page 229, as authority for the action taken. In that case, this Honorable Court, in commenting upon the question pertinent to this instant issue, stated:

> "But the fact that the United States is not a party to the state court litigation does not mean that the federal court should initiate interpretation of a state statute. In fact, where questions of constitutionality are involved—and the Government contends that an application of the state statute adverse to its interests would be unconstitutional—our rule has been precisely the opposite: 'as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law.'"

We note that this Court in the *Leiter* case specifically approved of the procedure whereby a matter in Federal District Court was stayed to permit an interpretation

of a State Statute. Mr. Justice Douglas dissented in part. Our appreciation of this dissent is that it was based upon the fact that the United States was a party and had rights at issue which should have been litigated through the Federal Judicial system. It also appears to us that Mr. Justice Douglas would not have dissented had the contest been between parties other than the United States, as is the case here, since approval was specifically stated in the second paragraph of the dissent to actions such as taken here by the District Court:

> "That procedure is an advisable one where private parties question the constitutionality of a State Statute. An authoritative construction of the state law may avoid the constitutional issue or put it in new perspective."

Essentially, the stay order here, as in the *Leiter* case, stemmed from the sanction set forth with great clarity in the leading case of *Spector Motor Company v. McLaughlin*, 323 U. S. 101, at page 105:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding

local law. Railroad Commission v. Pullman Co., supra; Chicago v. Fieldcrest Dairies, 316 U. S. 168; In re Central R. Co. of New Jersey, 136 F. (2d) 633. See also, Burford v. Sun Oil Co., 319 U. S. 315; Meredith v. Winter Haven, 320 U. S. 228, 235; Green v. Phillips Petroleum Co., 119 F. (2d) 466; Findley v. Odland, 127 F. (2d) 948; United States v. 150.29 Acres of Land, 135 F. (2d) 878. Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication."

In view of this language, it would seem most extraordinary to conclude that the District Court here abused its discretion by acting precisely in accord with the principles laid down by this Court in the *Spector* case, and, particularly, when this very same District Court had been instructed **identically** in the *Leiter* case. Moreover, there were substantially stronger reasons for the stay order here than in either the *Spector* or the *Leiter* cases. Apart from the questions of constitutionality under the United States Constitution, (R. 14, 17), the District Court had before it serious questions of validity under the Louisiana Constitution and Louisiana Statutes, hitherto uninterpreted in this context. But, of even more gravity, there was present here the dilemma arising out of the peculiar nature of the statute upon which this action was based, *i. e.*, a prohibition against a suspensive appeal and an absence of remedy to the property owner in the event his property was taken through lower court proceedings and then the taking was reversed by an appellate court after the title to the

property had been transferred. This situation made for the most serious potentiality of irreparable damage. On the other hand, it is apparent that no irreparable damage would arise through the stay order; the property sought to be expropriated was an existing electric system which was then, and is now, serving customers who needed and desired electricity. Hence, no irreparable damage could come to the consumers. The City has not and will not suffer any irreparable damage through the stay order since, if upheld in its attempt at expropriation, it would obtain the electric system on the same basis of value that it would without the stay order. The only party susceptible to irreparable damage in this proceeding would be Louisiana Power & Light Company, in the event its property were taken without an opportunity to test the validity of Act 111 of 1900.

This Court, in considering the delicate and intricate interplay of State law and federal law in the landmark case of *Erie Railroad Company v. Tompkins*, 304 U. S. 64, announced the broad principle that the Federal Courts should look to the State Courts for an interpretation of State laws and should follow the interpretation given to State law by State Courts. The action of the District Court in this case in staying proceedings pending an interpretation of the State statute on which the entire cause hinges is surely in pursuance of that general policy. Since no irreparable damage is shown to result from this stay order, the District Court's action would appear properly to further the sound policy with relation to the interplay of State and Federal law established by this Court.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the stay order by the District Court was within its inherent power, was a proper exercise of discretion, and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

PELTIER & PELTIER,
Harvey Peltier,
Donald L. Peltier;

MONROE & LEMANN,
J. Blanc Monroe,
Monte M. Lemann,
J. Raburn Monroe,
Malcolm L. Monroe,
Melvin I. Schwartzman,
Andrew P. Carter,

By _____
1424 Whitney Building,
New Orleans 12, Louisiana,
Attorneys for Louisiana Power & Light Company, Petitioner.

CERTIFICATE.

I hereby certify that a copy of the above and foregoing brief has been served on opposing counsel on this _____ day of February, 1959.

_____

APPENDIX "A".

28 U. S. C. § 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U. S. C. § 1292:

"The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other dispositions of property;

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

"(4) Judgments in civil actions for patent infringement which are final except for accounting."

Rule 42 (b), Federal Rules of Civil Procedure:

"Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

Louisiana Revised Statutes, Title 19, § 105:

"No appeal from the judgment of the lower court made by either party shall suspend the execution thereof. The payment of the amount decided on in the lower court by the municipal corporation to the owner or the deposit of that amount in the hands of the sheriff subject to the owner's order entitles the municipality to the title to the property in the same manner as a voluntary conveyance would do.

"If any change is made by the final decree in the decision of the cause, the municipality shall pay the additional assessment or may recover the surplus paid, as the case may be."

APPENDIX "B".

Opinion of Attorney General, State of Louisiana, October 10, 1951:

"Mr. Earl Applewhite,
Electric and Water Department Manager,
Town of Winnfield,
Winnfield, Louisiana.

"The following factual situation is presented in your letter to the Attorney General, bearing date of October 5, 1951.

"The Town of Winnfield owns and operates an electricity and water distribution system. The Louisiana Light and Power Company runs its electric power lines across the northwestern area of said town and furnishes electric service to the residents of such area. The territory over which the lines of said company run was located outside the incorporated limits of said town when first said lines were installed; now, however, said territory has been brought within the incorporated municipal limits.

"After explaining the reasons which prompt action of some character by the governing authority of the municipality, you ask, first, what might be done legally to bring about an amicable acquisition of the Louisiana Light and Power Company's power lines and electricity distribution system that are located within the town; and second, in default of amicable acquisition, whether such acquisition could be accomplished by expropriation proceedings.

"When the lines, equipment, and facilities of the company were installed, the area involved was located in Winn Parish, outside the municipal limits of Winnfield. With full authority to act, the police jury granted a limited franchise to the Company. It is our view, therefore, that the company's franchise, though limited, constitutes a vested right, no matter that the territory traversed by the company's lines and system now lies within the corporate limits of the town, and that any acquisition of such lines, equipment and other property of the system, short of an amicable transfer, would violate the constitutional rights of the company.

"A municipality has the same legal right to acquire a public utility as it does to construct a new one or to extend and improve an existing one; therefore, we see no reason why an amicable purchase of the Louisiana Power and Light Company's system within the area may not be effected. It should be borne in mind, however, that if any bonds are outstanding on the town's presently existing electricity and water distribution plant, equipment and facilities, no action should be taken prejudicial to the rights of the bondholders in bringing the Louisiana Power and Light Company's system within that which is owned and operated by the municipality.

"Presumably, revenue would have to be raised beyond the current cash resources of the town to effect the purchase. Your attention is accordingly directed to Article XIV, Section 14 (m) of the Louisiana Constitution, relative to the issuance of bonds for the purpose of constructing, acquiring, extending or improving any revenue producing public utility.

"In default of amicable purchase, we do not believe that the right of expropriation would lie. Pretermitting other considerations that might negate such right, we advise you that the right of expropriation relates to lands. This right does not extend to movables, facilities, equipment, etc. Even if certain structures along the company's right-of-way are classified as immovables by nature, and even if certain equipment and permanently attached movables forming a part of the physical layout are classified as immovables by destination, it must be borne in mind that all such elements are a part of a system, and the municipality can no more expropriate a public utility distribution system that it can expropriate a franchise validly issued at its inception by the police jury.

JOHN L. MADDEN"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 398

LOUISIANA POWER & LIGHT COMPANY,
Petitioner,

versus

CITY OF THIBODAUX,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE CITY OF THIBODAUX, RESPONDENT.

THEO. F. CANGELOSI,
Special Counsel,
612 North Boulevard,
Baton Rouge, La.;

LOUIS FENNER CLAIBORNE,
Special Counsel,
304 Marine Building,
New Orleans 12, La.;

REMY CHIASSON,
City Attorney,
City Hall,
Thibodaux, La.,
Attorneys for Respondent.

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STATUTES INVOLVED.

Since the issue of appealability was eliminated by the Order allowing Certiorari (R. 81), 28 U.S.C. 1291 and 28 U.S.C. 1292(1) are not involved on this hearing. The relevancy of Rule 42(b) of the Federal Rules of Civil Procedure, supported only by the paragraph of Argument

on pages 14-15 of Petitioner's brief, escapes us. The Louisiana Attorney General's Opinion annexed to Petitioner's brief as Appendix "B" thereof should be mentioned here, if it deserves the attention of this Court.

Respondent would add to the list of "Statutes Involved" the whole of Louisiana Act 111 of 1900 (R. S. 19:101-107), the statute invoked by the City in its condemnation action. It is reproduced herein as Appendix "A". We have also added, as Appendix "B", Section 6 of the Louisiana Declaratory Judgments Act (R. S. 13:4236).

STATEMENT.

Petitioner's statement of the case is substantially accurate in the material allegations. However, two purported "facts" there set down have not been admitted and should be deleted from the "Statement":

(1) Respondent specifically denied the legality of the "Memorandum of Agreement" which serves as a basis for the assertion that the City recognized Petitioner's right to service customers within the municipality's extended limits (R. 48). Accordingly, the point is at issue and has no place in the statement of the case.

(2) Likewise, the allegation that the City's electric rates are higher than Petitioner's must be ignored, for it is supported only by an affidavit attached to Petitioner's Memorandum in the District Court (R. 20-25). The only facts before this Court are those admitted by the Stipulation (R. 26-47), as qualified by Respondent's counsel (R. 47-48).

ARGUMENT.

I.

Does a United States District Court Have the Inherent Power in a Case at Law to Exercise the Discretion of Staying Proceedings in Order to Control the Progress of the Cause Before It in an Orderly Manner?

At the outset, we must frankly confess our surprise at the Court's readiness to consider this question as an issue in the case, inasmuch as we had conceded the point both in our brief before the Court of Appeals (p. 2) and in our brief in opposition filed here (pp. 2, 10). Were it not for the Court's direction, we would be hesitant to now re-open a question which we thought to have precluded ourselves from raising. But, responding to the invitation, we have more closely examined the jurisprudence and find that our concession was too hasty.

Indeed, a thorough search of the reports fails to show that this Court has ever had occasion to pass on the issue as presented by the instant appeal. True, it is now[1] settled that a court of equity has the power to stay the equitable proceedings before it. *Kansas City Sou. Ry. v. U. S.*, 282 U. S. 760 (1931); *Landis v. North American*

[1] If the matter is now settled, the power of even a court of equity to decline to itself adjudicate all issues before it was not always so clearly recognized by this Court. See **Cohens v. Virginia**, 6 Wheat. 264 (1821), at 404; **Suydam et al. v. Broadnax et al.**, 14 Pet. 67 (1840), at 74-75; **Hyde et al. v. Stone**, 20 How. 170 (1857); **Chicot County v. Sherwood**, 148 U. S. 529 (1893), at 534; **McClellan v. Carland**, 217 U. S. 268 (1910), at 281; **Kline v. Burke Constr. Co.**, 260 U. S. 226 (1922), at 234; **Risty v. Chicago, R. I. & P. Ry. Co.**, 270 U. S. 378 (1926), at 387; **Commonwealth Co. v. Bradford**, 297 U. S. 613 (1936), at 618-620. The last four decisions were cited with approval in **Meredith v. Winter Haven**, 320 U. S. 228 (1943), at 234. The Opinion in **McClellan, supra**, deserves particular notice.

Co., 299 U. S. 248 (1936); *Railroad Commission of Texas v. Pullman*, 312 U. S. 496 (1941); *City of Chicago v. Fieldcrest Dairies*, 316 U. S. 168 (1942); *Spector Motor Co. v. McLaughlin*, 323 U. S. 101 (1944); *A. F. of L. v. Watson*, 327 U. S. 582 (1946); *Shipman v. DuPre*, 339 U. S. 321 (1950); *Albertson v. Millard*, 345 U. S. 242 (1953); *Leiter Minerals, Inc., v. United States*, 352 U. S. 220 (1957); *Government Employees v. Windsor*, 353 U. S. 364 (1957). This follows naturally from the principle that the remedies of equity are extraordinary and discretionary. *Mass. State Grange v. Benton*, 272 U. S. 525 (1926); *Railroad Commission v. Oil Co.*, 310 U. S. 573, amended 311 U. S. 614 (1940); *Burford v. Sun Oil Co.*, 312 U. S. 315 (1943); *Railroad Commission v. Pullman, supra; City of Chicago v. Fieldcrest Dairies, supra; Great Lakes Co. v. Huffman*, 319 U. S. 219 (1943); *Rescue Army v. Municipal Court*, 331 U. S. 549 (1947); *Alabama Comm'n v. Southern R. Co.*, 341 U. S. 341 (1951). See *Meredith v. Winter Haven*, 320 U. S. 228 (1943), at 235; *Propper v. Clark*, 337 U. S. 472 (1949), at 491. Since the Court can dismiss the suit, it obviously has the power to take the less drastic action of staying proceedings, even indefinitely. It also seems clear that a Federal Court, sitting as a Court of equity for the purpose of passing on an equitable defense raised in an action at law, has the power, in a proper case, to enjoin the law proceedings before it in the same controversy. See *Enelow v. N. Y. Life Ins. Co.*, 293 U. S. 379 (1935).[2] The authority of a bankruptcy

[2] Though the Court there vacated the stay, it recognized the principle stated.

Ettelson v. Metro. Ins. Co., 317 U. S. 188 (1942) involved the same factual situation, but the case came here on a question certified by the Court of Appeals and the only point decided was the appealability of the stay order, an issue as to which certiorari was not granted in the instant proceeding.

court[3] to stay proceedings pending the determination of an issue in the case by another tribunal has likewise been recognized. *Thompson v. Magnolia*, 309 U. S. 478 (1940); see *Ex parte Baldwin*, 291 U. S. 610 (1934), at 619. And the same power has been held to reside in a **court of admiralty**, under unusual circumstances. *Langnes v. Green*, 282 U. S. 531 (1931). See also, *Watts, Watts & Co. v. Unione Austriaca*, 248 U. S. 9 (1918). Finally, this Court has ruled that a Federal Court is empowered to stay proceedings in a civil case at law **when applicable statutes required determination of the question by an administrative body.** *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 247 (1913). *Gen. American Tank Car Corp. v. El Dorado T. Co.*, 308 U. S. 422 (1940); both cases requiring an ICC ruling before the Court could proceed; and *Shanferoke v. Westchester Co.*, 293 U. S. 449 (1935), in which the stay pending arbitration was expressly directed by statute (43 Stat. 883; 9 U.S.C., sec. 3).

Plainly, none of the decisions just cited bears on the question whether a Federal Court, sitting as a **court of law**, as distinguished from a court of equity, or bankruptcy or admiralty, has the power, in an **ordinary civil case at law**[4] of which it has jurisdiction, to stay the proceedings before it. The only expressions by this Court on that general proposition occur, by way of *dictum*, in two

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[3] This Court has held that ". . . courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity." **Local Loan Co. v. Hunt**, 292 U. S. 234 (1934), at 240. See 11 U. S. C., sec. 11.

[4] From the phrasing of the Question Presented in the Petition for Certiorari, we take it to be conceded that the condemnation proceeding here involved is a "civil action at law." The Court of Appeals so decided (R. 64-65) and Petitioner has not quarreled with that holding.

cases involving stays issued by courts of equity. In *Enelow, supra*, at 381-382, there is a reference to "a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice." And in *Landis v. North American Co., supra*, speaking for the Court, Mr. Justice Cordozo says, apparently without distinguishing between suits in equity and actions at law, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." (at 254). Since the cases are relatively old, and the pronouncements, in any event, mere *dicta*, we might urge the Court to disregard these passages and consider the question afresh. But there is no need to repudiate anything said. The Court may now re-state the rule by merely restricting more precisely the scope of the *Enelow* and *Landis* opinions.

Indeed, it does seem elementary that every court, whether sitting in equity or at law, has, as Mr. Chief Justice Hughes said in *Enelow*, the "inherent power to control the progress of the cause so as to maintain the orderly processes of justice." Thus, it is plain that a law court may grant continuances, and may delay or postpone its decision for a reasonable time. Whether the temporary postponement is motivated by the refusal of a party to the suit to comply with an order of the court *(U. S. v. Richardson*, USCA-5th C., 1953, 204 F. (2d) 552), or by the court's desire to be guided by the forthcoming decision of another tribunal in a similar pending case *(United States v. Horns*, USCA-3rd C., 1945, 147 F. (2d) 57; *Cover v.*

Schwartz, USCA-2nd C., 1940, 112 F. (2d) 566; *United Pipe Line Company v. Tyler Gas Service Company*, USCA-5th C., 1957, 247 F. (2d) 681; *Day v. Pennsylvania Railroad Company*, USCA-3rd C., 1957, 243 F. (2d) 485), or by any other sound reason *(Watts, Watts & Co. v. Unione Austriaca, supra)*, seems immaterial. Nor should it matter whether the court's action is labelled a "stay of proceedings", a "taking under advisement", or, more simply, a "continuance", provided the effect is only to temporarily delay the trial or decision of the issue. See *Cover v. Schwartz, supra*, at 567.

But is there not a clear distinction between the **temporary** postponement of a decision pending the outcome of a case elsewhere by which the court may be **guided**, and the **absolute refusal** of a Federal court to **ever** decide for itself an issue properly before it in a case at law, accompanied by a suggestion to the complainant that he seek a resolution of that problem in a **new** action before the State tribunals? Though both may be termed "stay orders", the difference between the two kinds of rulings is basic. It is one of principle: In the first instance, the court merely postpones decision, and only for a limited time; in the other, it **abdicates** its authority, and "passes the buck" back to the State courts. Compare *McClellan v. Garland*, 217 U. S. 268 (1910), at 234. In a case at law, especially when jurisdiction is founded on diversity of citizenship, we know of no law which authorizes a Federal court to thus decline to adjudicate the controversy.

Returning to the question presented, "Does a United States District Court have the inherent power in a case at

law to exercise the discretion of staying proceedings in order to control the progress of the cause before it in an orderly manner?", we would answer that it is poorly phrased to fit the facts of the case at bar, but that, as written, it must be answered: "Yes, **provided the stay order does not amount to a refusal by the Court to itself decide the issue properly before it.**" Since the instant order is, in effect, a refusal to decide, it is unauthorized.

II.

Assuming That a United States District Court Does Have Discretion to Stay Proceedings in Order to Control the Progress of a Law Case Before It in an Orderly Manner, Did the District Court Abuse That Discretion?

Even if it be determined that the District Court, in the instant case, had the **power** to stay proceedings as it did, nevertheless, we submit that, as a matter of **sound discretion,** it should not have done so. The lower Court's action was, at best, an **abuse of power.**

It is, of course, well settled, that the device of remitting litigants to the State courts for a determination of State law questions is a last resort of the Federal Courts. As this Court has said, it is a "departure from normal procedure" to be followed only in "exceptional cases", under "special circumstances." See *Meredith v. Winter Haven*, 320 U. S. 228 (1943), at 234, 237; *Propper v. Clark*, 337 U. S. 472 (1949), at 491, 492. As we shall demonstrate, under the jurisprudence of this Court nothing warranted the use of this abnormal and burdensome procedure here.

A. ***This Suit Does Not Attempt to Enjoin or Interfere With State Action.***

We do not quarrel with the practice of the Federal Courts to refrain, whenever possible, from interfering with the administration by the States of their own laws, at least until interpretation and application has demonstrated their repugnance to Federal law or the Constitution. In pursuance of this wise policy, stay orders remitting the parties to the State tribunals have often been entered. But, in this Court at least, approval of such orders has been almost entirely **limited to these situations,**[5] cases in which the Federal Court was asked to enjoin the enforcement of an untested State statute, city ordinance or administrative order, or to restrain the action of a State official or court.

Thus, in the landmark case of *Railroad Commission of Texas v. Pullman*, 312 U. S. 496 (1941), the suit was to enjoin the order of a public service commission; in *Spector Motor Co. v. McLaughlin*, 323 U. S. 101 (1944), to arrest the collection of a tax under a State law; in *A. F. of L. v. Watson*, 327 U. S. 582 (1946), to restrain the application of a "right-to-work" law; in *Slipman v. DuPre*, 339 U. S. 321 (1950), to enjoin the enforcement of a statute regulating the fisheries and shrimping industry; in *Albertson v. Millard*, 345 U. S. 242 (1953), to prevent the enforcement of a communist control statute; and in *Government Employees v. Windsor*, 353 U. S. 364 (1957), to enjoin the operation of a law penalizing public employees who joined labor unions. Similarly, in *City of*

[5] But the mere fact that the case falls into this category does not necessarily justify a stay order. See **Meredith v. Winter Haven**, **supra**; **Doud v. Hodge**, 350 U. S. 485 (1956), quoted in pertinent part, **infra**, pp. 17-18.

Chicago v. Fieldcrest Dairies, 316 U. S. 168 (1942), the prayer was for a mandatory injunction directing the issuance of a permit refused under a city ordinance; and in *Leiter Minerals, Inc., v. United States*, 352 U. S. 230 (1957), the complainant asked for a stay of State Court proceedings. See also, *Burford v. Sun Oil Co.*, 312 U. S. 315 (1943; *Rescue Army v. Municipal Court*, 331 U. S. 549 (1947); and *Stainback v. Mo Hock Ke Loh Po*, 336 U. S. 368 (1948); in all three of which cases proceedings for a prohibitory injunction against State (or territorial) action were dismissed rather than stayed.

In the instant case, on the contrary, the plaintiff merely sought condemnation under existing statutes. There was **no danger of interference with the administrative processes of the State** to justify an abdication of power by the Federal Court.

B. ***The Jurisdiction of the Federal Court in This Instance is Founded on Diversity of Citizenship, Regardless of the Existence of a Federal Question.***

It is also noteworthy that in none of the pre-cited decisions, except *Spector*, was the **diversity** jurisdiction of the Court invoked. Obviously, when its right to adjudicate the matter presented is based solely on the allegation that a Federal question is involved, which might be altogether avoided by a State court interpretation of the challenged law, the Federal Court may more easily remand the parties to the State tribunal. But when, as here,[6] the litigants are of right before the Federal Court,

[6] Though a Federal question was subsequently injected, the basis of Federal jurisdiction in this case was diversity of citizenship. (See Petition for Removal, R. 1-3).

regardless of any Federal issue, it is doubtful whether the Court can properly refuse to decide their controversy in all its aspects without "enervating diversity jurisdiction." See *Propper v. Clark*, *supra*, at 490. Indeed, the whole purpose of the jurisdictional Act in opening the Courts of the United States to citizens of another State, despite the absence of a Federal question, is to provide them an impartial forum for the decision of their controversies **under State law.**

C. *No Bona Fide Federal Constitutional Question Is Involved in This Litigation.*

Most important, it must be emphasized that every case in which the "*Pullman* doctrine" was applied by the Supreme Court (save only *Magnolia*) involved a **Federal constitutional** issue. In each instance, the Federal Court referred the litigants to the State tribunals because the decision there might obviate the necessity for a decision on the constitutionality of the statute or action complained of. Thus, in *Spector Motor Co. v. McLaughlin*, *supra*, at 105, the Supreme Court said:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. Avoidance of such guess-work, by holding the liti-

gation in the federal courts until definite determinations of local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication."

Leiter, the only decision cited by the District Court as authority for the stay order, clearly follows the same rationale. There the Court points out that one interpretation of the statute invoked raises a constitutional issue under the Contract Clause while a holding that the Louisiana provision is inapplicable to the case would eliminate that question, and it cites the rule of referring local law problems to the State courts in such circumstances. 352 U. S., at 228-229.

In the instant case there is no *bona fide* constitutional question presented. It is true, the Company alleges that condemnation of its franchises to operate an electric distribution system in the area in dispute would deprive it of property without due process of law and would work an impairment of the obligation of contracts. But, in view of the fact that this argument was settled adversely to its position by this Court as long ago as 1848 in the *West River Bridge* case, we must look on the contention as insubstantial, if not frivolous. See *West River Bridge v. Dix*, 6 How. 507 (1848); *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685 (1896). And, of course, it is axiomatic that a litigant can no more defeat than create jurisdiction by a mere allegation of unconstitutionality which presents no substantial question. Moreover, the District Judge, in his Opinion, makes no reference whatever to this argument. It must be assumed that he dismissed it as patently unfounded.

Though no mention is made of the Federal Constitution, Petitioner apparently attempts to raise a new constitutional argument by deploring the absence of a provision for suspensive appeal in the Louisiana condemnation statute invoked by the City. (See Petitioner's brief, pp. 19-20). Since the defense was not made before the District Court (R. 11-18), nor before the Court of Appeals, nor even in the Petition for Certiorari, but is raised now in brief for the first time, it should be disregarded as coming too late. Moreover, it having been stipulated that Rule 71A of the Federal Rules of Civil Procedure would govern (R. 19, 26), it is doubtful whether the appeal provision of the Louisiana statute could operate. But, in any event, it is nowhere shown how an application of the challenged Section would violate any Federal Constitutional guarantee.[7] We may, accordingly, dismiss this new argument as insubstantial.

D. ***In This Instance, There Is No Pending State Court Proceeding or Readily Available Tribunal for Determination of the Issue.***

It should be pointed out that many of the decisions condoning the procedure here applied emphasize the **pendency of State Court proceedings** in which the issue can be as conveniently litigated, or, at least, the **ready availability of a State tribunal** for such a determination. See, *e. g., City of Chicago v. Fieldcrest Dairies, supra,* at 173; *A. F. of L. v. Watson, supra,* at 599; *Albertson v. Millard, supra,* at 244; *Layton v. Thayne,* 144 F. (2d) 94 (10th C., 1944) at 96; *McLaine v. Lance,* 146 F. (2d) 341

[7] We might note that the Federal condemnation law itself contains substantially the same provision. See 40 U. S. C., sec. 258b.

(5th C., 1945) at 344-345. See also *Hillsborough v. Cromwell*, 326 U. S. 620 (1946), at 628; *Power Comm'n v. Interstate Gas Co.*, 336 U. S. 577 (1949), at 583-584. That the plaintiff's ability to obtain a reasonably speedy determination of the question precluded must be an important consideration for the Federal Court withholding decision of the local law issue is obvious enough.

There is at present no action in the State Courts of Louisiana from which a decision of the question avoided by the District Court can be expected. It is true the Trial Judge suggests to Respondent that it seek a determination of the issue through the Louisiana Declaratory Judgment procedure. But it is not clear that a State tribunal could, or would, entertain such an action. Indeed, Section 6 of the Act (La. R. S. 13:4236, quoted in Appendix) provides that if the judgment rendered will not finally dispose of the litigation the Judge has discretion to refuse to entertain the suit. Remembering that the Judge to whom application would have to be made is the same Judge from whom this litigation was removed by order of the Federal District Court, it may be surmised that he would be reluctant to have the matter returned to him for the limited purpose of passing on what is labelled a knotty question of interpretation.

Another problem arises from the requirement of the judgment complained of that the Supreme Court of Louisiana must pass on the point at issue before the Federal Court will proceed to trial of the case on the merits. Let it be assumed that the Louisiana District Court entertains the declaratory action and holds, as we would have reason to expect, that Act 111 of 1900 authorizes the con-

demnation prayed for, but that the Company, preferring to produce a stalemate, fails to appeal. Since the City cannot itself appeal from a decree in its favor, how could it obtain the required authoritative ruling of the Louisiana Supreme Court? In our view, the impasse just outlined represents not a remote possibility, but **the most probable eventuality.** The action of the District Court will, then, in all likelihood, work not only a delay, but an absolute **denial** of justice.

E. ***The Issue Avoided Is Not Difficult.***

In his Opinion, the District Judge assigns only one reason for declining to decide the controversy before him: That the issue was new and difficult (R. 49-52). This alone is, of course, no excuse for an abdication of power. Indeed, since the decision in *Erie v. Thompkins*, 304 U. S. 64 (1938), no principle has been so well settled as that which imposes on the Federal Courts, in all but the "exceptional cases" already outlined, the duty to decide questions of State law, **no matter how novel or how difficult.** *Meredith v. Winter Haven, supra,* at 234-235, 237-238; *Markham v. Allen*, 326 U. S. 490 (1946), at 495; *Williams v. Green Bay & W. R. Co.*, 326 U. S. 459 (1946), at 553-554; *Estate of Spiegel v. Comm'r*, 335 U. S. 701 (1949), at 707; *Propper v. Clark, supra*, at 490; *Commissioner of Internal Revenue v. Lewis*, 141 F. (2d) 221 (3rd C., 1944); *In re President and Fellows of Harvard College*, 149 F. (2d) 69 (1st C., 1945); *Cooper v. American Air Lines*, 149 F. (2d) 355 (2nd C., 1945); *Guardian Life Ins. Co. of America v. Kortz*, 151 F. (2d) 582 (10th C., 1945); *Versluis v. Town of Haskell, Okl.*, 154 Fed. (2d) 935 (10th C., 1946); *Maryland Casualty Co. v. Glassell-*

Taylor & Robinson, 156 F. (2d) 519 (5th C., 1946); *Franklin Life Ins. Co. v. Johnson*, 157 F. (2d) 653 (10th C., 1946); *Rogers v. Girard Trust Co.*, 159 F. (2d) 239 (6th C., 1947); *Food Fair Stores v. Food Fair*, 177 F. (2d) 177 (1st C., 1949); *Mogis v. Lyman-Rickey Sand & Gravel Corp.*, 190 F. (2d) 203 (8th C., 1951); *Kirby Lumber Co. v. Laird*, 231 F. (2d) 815 (5th C., 1956); see also, *Pierce v. Ford Motor Co.*, 190 F. (2d) 910 (4th C., 1951), at 915; *Arinan v. A. J. Lindemann & Hoverson Co.*, 238 F. (2d) 72 (7th C., 1956), at 75.

As Chief Justice Stone said, speaking for the Court in *Meredith v. Winter Haven, supra*, at 320 U. S. 234-235 and 237-238:

> ". . . the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.
>
> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever

necessary to the rendition of a judgment. . . . When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.

". . .

"Erie R. Co. v. Tompkins, did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain. . . . Even though our decisions could not finally settle the questions of the state law involved, they did adjudicate the rights of the parties with the aid of such light as was afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law. . . ."

This Court recently affirmed the principle in *Doud v. Hodge*, 350 U. S. 485 (1956):

"This Court has never held that a district court is without jurisdiction to entertain a prayer for an

injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the Federal Constitution simply because the state courts have not yet rendered a clear or definitive decision as to the meaning or federal constitutionality of the statute."

Under these decisions, it is clear that the District Court had no sound excuse to abstain from deciding the issue presented to it, even if it was very difficult. But, as a matter of fact, we submit the question before the Federal Court was extremely simple to resolve and required no special guidance from the State tribunals.

It is true that no Louisiana Appellate Court has interpreted Act 111 of 1900. But we respectfully suggest that the difficulty of applying that statute to the facts of the present controversy is exaggerated. Indeed, a mere reading of the Act (Appendix "A", *infra*), together with the City's petition (R. 4-8), will show that the one fits the other like a glove.

Two possible obstacles are interposed to its application by the District Judge. The first is the alleged fact that in 1900, when the statute was enacted, private utility systems were confined within the boundaries of a single municipality. Nothing in the record supports this assertion, save only the bald statement to that effect in the Company's original brief filed in the District Court; but, whatever the fact, we submit that, without a limitation in the statute itself, no restriction on its application to that single situation is justified.

The other objection raised is a 1951 Louisiana Attorney General's Opinion (quoted in Petitioner's brief, Appendix "B"), advising that a similar contemplated expropriation could not be effected. With due deference, we submit that the "Opinion" is in error, and demonstrably so. Indeed, one of the reasons given for the conclusion is that a franchise constitutes a "vested right" the forceable acquisition of which would "violate . . . constitutional rights." But it is elementary that condemnation for a public use accompanied by just compensation is a constitutional taking which invades no due process guarantee. Nor does expropriation of a franchise impair the obligation of contracts, as this Court, a somewhat weightier authority than an Assistant Attorney General of Louisiana, declared as early as 1848.[8] The only other obstacle raised by the writer of the "Opinion" to the proposed condemnation is the proposition laid down, without citation of any authority, that in Louisiana "expropriaton relates to lands", this in the face of the statute here invoked which specifically lists "buildings, machinery, appurtenances, fixtures, improvements, mains, pipes, sewers, wires, lights, poles and property of every kind, connected therewith" as subject to condemnation. (See La. R. S. 19:101, quoted in Appendix). The Assistant Attorney General, who ignores all authorities, never cites Act 111 of 1900. We can only assume that he overlooked it altogether. Of course, the "Opinion" is not intended to be binding on the Courts, but we suggest that, in view of its patent error, the District Court might have given it less weight.

These apparent obstacles overcome, the supposed difficulty of the issue presented to the Trial Court is dissipated, and no excuse remains to postpone decision.

[8] See West River Bridge v. Dix, supra.

Though the District Judge did not mention them, and Petitioner himself all but abandoned them below, arguments based on a purported conflict between Act 111 of 1900 and the **Louisiana** Constitution are now paraded before this Court to demonstrate the "seriousness" and "difficulty" of the State law problems involved. We may simply answer that everyone is free to invoke as many Constitutional arguments as there are provisions in the Constitution, but that the mere mention of them does not render them "substantial questions" in the case. Here Petitioner does not even append the text of the Sections of the Louisiana Constitution relied on. Accordingly, we are excused from rebutting these arguments. The Court should disregard them, since they have not been shown to present serious issues.

F. ***Considerations of Justice and Equity.***

Before closing, we wish to emphasize the nature of the action and the necessity for concluding it with all deliberate speed. This is a **condemnation proceeding** by an incorporated municipality. In principle it should be concluded swiftly. But, more important, as a practical matter, long delays will be most injurious to the public interest. Commitments made must shortly be revoked or confirmed, and all manner of decisions affecting a large population must be taken. This action will already have been **pending in the Courts for more than two years** when this appeal is heard. Even under the most favorable decision, it must necessarily run the course of several more months. We hesitate to predict what further time would be required to run the gamut of the Louisiana Courts, only to return to the lowest Federal Court, from whence an ap-

peal is likely. Though not at the instance of Respondent, the suit has already been removed from one Court to another. Must it now retrace its steps and return to the State tribunal? We urge these practical and equitable considerations upon the Court, and submit that it can properly take them into account. See *Meredith v. Winter Haven, supra,* at 237; *Public Utilities Comm'n v. Gas Co.,* 317 U. S. 456 (1943), at 462-463; *Janes v. Sackman Bros. Co.,* 177 F. (2d) 928 (2nd C., 1949), at 933.

CONCLUSION.

For the foregoing reasons, Respondent, City of Thibodaux, prays that the judgment of the Court of Appeals be affirmed and that this cause be remanded to the District Court with directions to recall the stay order issued herein and to proceed with all deliberate speed to a decision of all issues in the case.

Respectfully submitted,

THEO. F. CANGELOSI,
Special Counsel,
612 North Boulevard,
Baton Rouge, La.;

LOUIS FENNER CLAIBORNE,
Special Counsel,
304 Marine Building,
New Orleans 12, La.;

REMY CHIASSON,
City Attorney,
City Hall,
Thibodaux, La.,
Attorneys for Respondent.

CERTIFICATE OF SERVICE.

I hereby certify that copies of the foregoing brief have been served on Peltier & Peltier, Harvey Peltier, and Monroe & Lemann, J. Raburn Monroe, the attorneys for Louisiana Power & Light Company, petitioner, by depositing the same properly addressed, first class postage prepaid, in the United States Mail, on this ..... day of March, 1959.

APPENDIX.

A. **Act 111 of 1900** (being Part III of Title 19 of the Louisiana Revised Statutes of 1950, which reads as follows):

"Title 19

"EXPROPRIATION

"* * *

"PART III. EXPROPRIATION BY MUNICIPALITIES OF SOME PUBLIC UTILITIES.

"§ 101. *Electric light, gas, or waterworks plants, expropriation; prescription of damage claims*

"Any municipal corporation of Louisiana may expropriate any electric light, gas, or waterworks plant or property whenever such a course is thought necessary for the public interest by the mayor and council of the municipality. When the municipal council cannot agree with the owner thereof for its purchase, the municipal corporation through the proper officers may petition the judge of the district court in which the property is situated, describing the property necessary for the municipal purpose, with a detailed statement of the buildings, machinery, appurtenances, fixtures, improvements, mains, pipes, sewers, wires, lights, poles and property of every kind, connected therewith, and praying that the property described be adjudged to the municipality upon payment to the owner of the value of the property plus all dam-

ages sustained in consequence of the expropriation. Where the same person is the owner of both gas, electric light, and water works plants, or of more than one of any one kind of plant, the municipal corporation may not expropriate any one of the plants without expropriating all of the plants owned by the same person.

"All claims for damages to the owner caused by the expropriation of any such property are barred by one year's prescription, running from the date on which the property was actually taken possession of and used by the political corporation.

"§ 102. *Appointment of commissioners; duties, oath*

"Upon receipt of the petition filed pursuant to R. S. 19:101, the judge shall appoint six commissioners, who shall be property owners and residents of the parish. The commissioners shall carefully examine the property sought to be expropriated and shall make a detailed appraisal of its value, showing the separate valuation of the land, the buildings, the machinery, and the other property sought to be expropriated.

"Before beginning performance of their duties, the commissioners shall take an oath to faithfully and impartially discharge their duties.

"§ 103. *Report of commissioners; notice to show cause.*

"The commissioners shall make a report to the court of their investigation and estimate of

valuation within fifteen days after the notification to them by the clerk of their appointment. The clerk shall then deliver to the sheriff a notice to both parties directing them to show cause within ten days after service of this notice why the report of the commissioners should not be approved by the court, and the sheriff shall serve this notice upon all parties to the proceedings as in ordinary cases.

"§ 104. *Objections to report*

"If either party objects to the report of the commissioners, he shall file with the clerk a petition of opposition setting forth the objections and the reasons therefor. This opposition shall be tried and decided after hearing the evidence of both parties, as in ordinary cases.

"§ 105. *Appeal does not affect judgment*

"No appeal from the judgment of the lower court made by either party shall suspend the execution thereof. The payment of the amount decided on in the lower court by the municipal corporation to the owner or the deposit of that amount in the hands of the sheriff subject to the owner's order entitles the municipality to the title to the property in the same manner as a voluntary conveyance would do.

"If any change is made by the final decree in the decision of the cause, the municipality shall

pay the additional assessment or may recover the surplus paid, as the case may be.

"§ 106. *Costs; when paid by owner*

"If a tender is made by the municipality of the true value of the gas, electric light, or water works plant to the owner thereof, before proceedings for a forced expropriation, the costs of the proceedings shall be paid by the owner.

"§ 107. *Encumbrances cancelled and paid; failure to pay amount fixed in due time*

"Whenever any gas, electric light, or water works plant encumbered with mortgages or privileges of any kind is expropriated by any municipality, it passes to the municipality free and clear of all encumbrances. However, the amount decreed to be paid therefor shall be paid by the corporation into the court within six months from the date of final judgment therein and distributed to the mortgage and privileged creditors according to their priority. In the event the municipal corporation fails to pay the amount fixed by the judgment of expropriation within six months after its rendition, the judgment becomes null and void and the municipality is liable for all damages suffered by reason of its failure to comply with the terms of the expropriation judgment."

B. **Section 6 of the Louisiana Declaratory Judgments Act** (being Section 4236 of Title 13 of the Louisiana Revised Statutes of 1950, which reads as follows:)

"§ 4236. *Court may refuse declaratory judgment; when*

"The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 398

LOUISIANA POWER & LIGHT COMPANY,
Petitioner,

versus

CITY OF THIBODAUX,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR CITY OF THIBODAUX, RESPONDENT.

THEO. F. CANGELOSI,
Special Counsel,
612 North Boulevard,
Baton Rouge, La.;

LOUIS FENNER CLAIBORNE,
Special Counsel,
304 Marine Building,
New Orleans 12, La.;

REMY CHIASSON,
City Attorney,
City Hall,
Thibodaux, La.,
Attorneys for Respondent.

Montgomery & Co., "The Brief Specialists", 439 Chartres St., N. O., La.

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

City of Thibodaux, Respondent, through its undersigned counsel, begs leave of the Court to file the within Supplemental Brief, restricted to the following two questions raised by the Court during oral argument and not satisfactorily answered by the Original Brief for Respondent filed herein:

1. Whether there are, in fact, any serious or difficult state law problems in interpreting and applying Louisiana Act 111 of 1900 to the facts of the case at bar;

2. The extent of the delay in the final disposition of this case which would result from reversal of the Judgment of the Court of Appeals and re-instatement of the stay order entered by the District Court, as opposed to the time required for decision in the event of, either:

a) Affirmance of the Court of Appeal Judgment and remand of the cause to the District Court for disposition by it of all issues; or,

b) Vacation of the stay order entered by the District Court and remand of the whole case to the Courts of Louisiana.

THEO. F. CANGELOSI,
Special Counsel,
612 North Boulevard,
Baton Rouge, La.;

LOUIS FENNER CLAIBORNE,
Special Counsel,
304 Marine Building,
New Orleans 12, La.;

REMY CHIASSON,
City Attorney,
City Hall,
Thibodaux, La.,
Attorneys for Respondent.

By _____
Louis F. Claiborne

CERTIFICATE OF SERVICE.

I hereby certify that copies of the foregoing Motion have been served on Peltier & Peltier, Harvey Peltier, and Monroe & Lemann, J. Raburn Monroe, Andrew P. Carter, the attorneys for Louisiana Power & Light Company, Petitioner, by depositing the same properly addressed, first class postage prepaid, in the United States Mail, on this ..... day of April, 1959.

Louis F. Claiborne

IN THE

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SUPPLEMENTAL BRIEF FOR CITY OF THIBODAUX, RESPONDENT.

I. There Are No Serious or Difficult Problems in Interpreting and Applying Louisiana Act 111 of 1900 to the Facts of the Case at Bar.

At the outset, we must re-iterate that *this Court has never yet approved or directed a stay of proceedings before the Federal Court awaiting the resolution of state law issues by the state tribunals in an ordinary case at law of which the Federal Court had jurisdiction because of diversity of citizenship, which presented no substantial Federal Constitutional issue and involved no interference*

with State administrative processes, where there was no then pending state court proceeding in which the questions could be promptly litigated, merely because the state law issues were new or difficult. Indeed, to hold that a stay is proper under the circumstances outlined the Court must necessarily overrule its decision in *Meredith v. Winter Haven*, 320 U. S. 228 (1943), and repudiate the language of its former Chief Justice quoted at pages 16 and 17 of Respondent's Original Brief. Moreover, since almost every case before the United States Courts solely because of diversity of citizenship that is not resolved before trial involves *some* point of state law that has not been definitely passed on by the highest State tribunal, a holding that Federal Courts should not decide controverted state law issues would certainly "enervate diversity jurisdiction" *(Propper v. Clark*, 337 U. S. 472 (1949) at 490), if it would not actually amount to *legislating* out of the United States Code the provisions of 28 U.S.C., § 1332, despite the clear contrary intent of Congress. (See Mr. Justice Frankfurter, dissenting in *Burford v. Sun Oil Co.*, 319 U. S. 315 (1943), at 336-348).

Relying on this reasoning, which we thought supported by the jurisprudence of the Court, we had not initially discussed the state law issues at length. But, because of the view expressed on the oral argument of this cause by members of this Honorable Court, that the difficulty of the state law questions in the present matter might alone justify the stay order entered by the District Court, we feel compelled to examine more carefully these supposed "problems". For, if the actual difficulty of those questions is now to be made the test of the propriety of recourse to such a procedure, certainly

the Court cannot merely accept the *allegation* by a party to the controversy that there are serious problems; else, henceforth, such an averment will become the standard and sure method of remitting any diversity case to the state courts.

It would seem to us that the burden of showing the difficulty of the state law issues falls on the party relying thereon to transfer the controversy out of the Federal Court, and that the discharge of that burden requires something more than the mere citation of allegedly conflicting State Constitutional provisions and State statutes, without even appending or quoting the laws invoked, much less explaining the claimed repugnancy. Nevertheless, in the instant case the proposition has been advanced that since the District Judge evidently felt the questions were difficult (without, however, explaining his quandary very clearly), this Court should accept that determination in the absence of a contrary showing. Under this view, we have no alternative but to assume the burden of proof, and ourselves attempt to convince the Court that the State law questions here involved (which have not yet been shown to present serious difficulties) are, in fact, easy of resolution.

Except for the "suspensive appeal" argument first raised here (A(3), *infra*), all of the so-called "obstacles" to the application of Louisiana Act 111 of 1900 (Printed as Appendix "A" to Respondent's Original Brief) to the facts of the case at bar are contained in the Company's Answer filed in the District Court (R. 11-18). These "legal defenses" are many in number, and they range from allegations of Federal unconstitutionality to argu-

ments that the statute invoked is inapplicable. For convenience, we shall group them in the following categories:

A. Those defenses invoking the *Federal Constitution* as a bar to the application of Louisiana Act 111 of 1900 in the premises

B. Those invoking the *Louisiana Constitution* as a bar to the application of the Act;

C. Those invoking other *Louisiana statutes* as a bar to the application of the Act;

D. Those urging that Louisiana Act 111 of 1900 is, by its own terms, *inapplicable* in the premises; and, finally,

E. Those alleging *defects in* the City's *expropriation petition.*

The sheer bulk of the arguments advanced discourages detailed consideration; for, however insubstantial they may be, considerable space will be required to adequately answer them all. But we have no choice. We can only try to be as brief as possible and beg the Court's indulgence.

A. *Federal Constitutionality.*

(1) Petitioner first alleges that, insofar as it purports to authorize the condemnation of the Company's property or its right to operate in the area recently acquired by the City of Thibodaux, Act 111 of 1900 (or any other statute so construed) works an "impairment of the obligation of contracts" in violation of the Contract Clause of Section 10 of Article 1 of the U. S. Constitution and effects a "taking of property without due process

of law" in contravention of the Fourteenth Amendment to the Federal Constitution, because the Company's right to operate in the area was conferred by, and its property was installed under, franchises granted by the Parish authority (R. 26-36) and allegedly confirmed both in writing (R. 36-37) and verbally by the City. (See Answer, Paras. XII, XIII, XX; R. 13-14, 16). Pretermitting all questions as to the existence, initial validity, or present force, of the agreements alleged, it was long ago decided by this Court that neither of the Constitutional provisions relied on forms a bar to the abrogation of such contracts in the excercize of the power of eminent domain. *West River Bridge v. Dix*, 6 How. 507 (1848); *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685 (1896). All conceivable questions arising out of the facts of the case at bar were authoritatively settled by the decision in the *Long Island Water Supply Co.* case, involving a very similar situation, from which the following passage is pertinent (116 U. S. at 688-691):

> "The contention of plaintiff in error is that the proceedings had under the statute which resulted in the judgment of condemnation violate section 10, article 1, of the Constitution of the United States, which forbids any State to pass a law impairing the obligation of contracts, and were not 'due process of law,' as required by the Fourteenth Amendment.
>
> "With reference to the first part of this contention it is said that in 1881 the town of New Lots made a contract with the water supply company by which for each and every year during the term of twenty-five years it covenanted to

pay to the company so much per hydrant for hydrants furnished and supplied by it; that the act of annexation continued the burden of this obligation upon the territory within the limits of the town, although thereafter the town as a separate municipality ceased to exist, and the territory became simply a ward of the city of Brooklyn; that the condemnation proceedings destroyed this contract and released the territory from any obligation to pay the stipulated hydrant rental; that a State or municipality cannot do indirectly what it cannot do directly; that as the municipality could not by any direct act release itself from any of the obligations of its contract, it could not accomplish the same result by proceedings in condemnation. We cannot yield our assent to this contention. All private property is held subject to the demands of a public use. The constitutional guarantee of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation. That the supply of water to a city is a public purpose cannot be doubted, and hence the condemnation of a water supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water supply system belongs, individual or corporation, or what franchises are connected with it—all may be taken for public uses upon payment of just compensation. It is not disputed by counsel that, were there no contract between the company and the town, the

water works might be taken by condemnation. And so the contention is practically that the existence of the contract withdraws the property, during the life of the contract, from the scope of the power of eminent domain, because taking the tangible property will prevent the company from supplying water, and, therefore, operate to relieve the town from the payment of hydrant rentals. In other words, the prohibition against a law impairing the obligation of contracts stays the power of eminent domain in respect to property which otherwise could be taken by it. Such a decision would be far reaching in its effects. There is probably no water company in the land which has not some subsisting contract with a municipality which it supplies, and within which its works are located, and a ruling that all those properties are beyond the reach of the power of eminent domain during the existence of those contracts is one which, to say the least, would require careful consideration before receiving judicial sanction. The fact that this particular contract is for the payment of money for hydrant rental is not vital. Every contract is equally within the protecting reach of the prohibitory clause of the Constitution. The charter of a corporation is a contract, and its obligations cannot be impaired. So it would seem to follow, if plaintiff in error's contention is sound, that the franchises of a corporation could not be taken by condemnation, because thereby the contract created by the charter is impaired. The privileges granted to the corporation are taken away, and the obli-

gation of the corporation to perform is also destroyed.

"The vice of this argument is twofold. First, it ignores the fact that the contract is a mere incident to the tangible property; that it is the latter which, being fitted for public uses, is condemned. And while the company, by being deprived of its tangible property, is unable to perform its part of the contract, and therefore can make no demands upon the town for performance on its part, it still is true that the contract is not the thing which is sought to be condemned, and its impairment, if impairment there be, is a mere consequence of the appropriation of the tangible property. Second, a contract is property, and, like any other property, may be taken under condemnation proceedings for public use. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 673. Its condemnation is of course subject to the rule of just compensation, and that is all that is implied in the decisions such as *Hall v. Wisconsin*, 103 U. S. 5, cited by counsel. * * *

"The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public uses." (at 688-694).

These decisions have been so consistently followed since that it is now extremely rare to find this argument raised. See *Greenwood v. Freight Co.*, 105 U. S. 13, 22 (1881); *Richmond etc. Railroad Co. v. Louisa Railroad*

Co., 13 How. 71, 83 (1851); *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 341 (1893); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 673 (1885); *Cincinnati v. Louis. & Nash. R.R. Co.*, 223 U. S. 390, 400 (1911). See also Joyce, *Treatise on Franchises (1909)*, Secs. 332-333, pp. 522-526; 11 McQuillin, *Municipal Corporations* (3d ed. 1950), Sec. 32.65, pp. 390-394; I Pond, *Public Utilities* (4th ed. 1933), Sec. 242, pp. 528 ff.; 3 *id.*, Secs. 861-862, pp. 1721-1724; I Nichols, *Eminent Domain* (3d ed. 1950), Sec. 2.1(2), p. 99; Sec. 4.3 et seq., pp. 297 ff.; II *id.*, Sec. 5.75, pp. 98-100.

(2) The Company initially complained of the *procedure* provided for in the Louisiana Act, alleging that it violated the Federal Constitution, presumably the "procedural due process" guarantee of the 14th Amendment (See Answer, Para. XXI, R. 17-18). An examination of the statute (Appendix "A" of Respondent's Original Brief) will show the complaint to be unfounded in every respect. Indeed, Section 102 provides that the commissioners shall be local property owners, sworn to impartiality; and Section 104 expressly permits objections to the report of the commissioners and allows both parties to introduce contradictory evidence. But, in any event, when it was agreed by Stipulation that the Federal procedure would be followed (R. 19, 26), the question of the fairness of the state procedure became moot.

(3) Another procedural due process argument, based on Section 105 of the Act, was advanced for the first time here. That contention has been adequately dealt with in our Original Brief (p. 13).

These were the only Federal Constitutional questions raised. We submit none of them presents a substantial issue.

B. *State Constitutionality.*

(1) The same "impairment of the obligation of contracts" and "due process" arguments made under the Federal Constitution (A(1), *supra*), were raised under the Louisiana Constitution, Article 1, Section 2, and Article 4, Section 15. The first cited Section reads:

> "*No person shall be deprived of* life, liberty or *property, except by due process of law.* Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."

The other Section invoked provides:

> "No ex-post facto law, *nor any law impairing the obligation of contracts, shall be passed;* nor shall vested rights be divested, unless for purposes of public utility, and for just and adequate compensation previously paid."

Petitioner evidently relies on the italicized portion of each provision. But, being mere transpositions of the comparable clauses in the Federal Constitution, they must be presumed to have the same import, and the arguments invoking the State Constitutional guarantees are no better than those already disposed of under the United States Constitution. Moreover, the second clause of each of the two cited provisions makes it abundantly clear that the drafters of the Louisiana Constitution recognized the ele-

mentary principle that a taking for a public purpose accompanied by just compensation neither denies the propery owner "due process of law" nor works an "impairment of his contract."

(2) The "procedural due process" arguments already discussed under the Federal Constitution (A(2) and A(3), *supra*) presumably also invoke the Due Process Clause of the Louisiana Constitution (quoted *supra*), but these contentions, like the one just discussed, have no greater merit under the local provision. We may consider them as fully disposed of.

(3) Perhaps the most far-fetched argument advanced by Petitioner is the claim that the proposed condemnation violates the provisions of the Louisiana Constitution prohibiting monopolies (See Answer, Para. XIV; R. 15). The Company relies on the following texts:

> "It shall be unlawful for persons or corporations, or their legal representatives, to combine or conspire together, or to unite or pool their interests for the purpose of forcing up or down the price of any agricultural or manufactured product or article of necessity, for speculative purposes, and all combinations, trusts, or conspiracies in restraint of trade, commerce or business, as well as all monopolies or combinations to monopolize trade, commerce or business, are hereby prohibited in the State of Louisiana, and it shall be the duty of the Attorney General, of his own motion, or any District Attorney of the State, when so directed by the Governor

or the Attorney General, to enforce this provision, by the injunction or other legal proceedings, in the name of the State of Louisiana, and particularly by suits for the forfeiture of the charters of offending corporations, incorporated under the laws of the State of Louisiana, and for the ouster from the State of foreign corporations. Provided, however, that nothing herein contained shall prevent the Legislature from providing additional remedies for the enforcement of this Section." (La. Const. 1921, Art. 19, § 14).

And:

"The Legislature shall enact general laws for the creation and regulation of corporations and for the prohibition of monopolies; and shall provide also for the protection of the public; and of the individual stockholders." (La. Const. 1921, Art. 13, § 5).

A mere reading of these provisions makes clear their intent to prevent the harmful *combination* of *private corporations* against the public interest, rather than to frustrate the *unilateral* expropriation by a *public body* of utility properties solely within its own municipal limits.

C. ***Allegedly Conflicting Louisiana Statutes.***

(1) It is argued that the proposed condemnation is unauthorized because of the failure of the City to first obtain the consent of the Louisiana Public Service Commission, said to be required under a statute and under a Commission Order (See Answer, Para. XV; R. 15).

The statute invoked, though not cited in its Answer, was identified by the Company in its Memorandum before the District Court as La. R. S. 45:123, which reads as follows:

> "In order to encourage a further development of coordinated statewide electrification based upon a planned economy, an electric public utility shall not render or extend its electric services or facilities to customers already receiving electric service from another electric public utility without first obtaining a certificate of public convenience and necessity from the Louisiana Public Service Commission. The Commission shall grant such a certificate only in the event that the electric service already being rendered is inadequate, or that the rates for such electric service are unreasonable."

The obvious purpose of the quoted provision prohibiting the entry by one electric utility into an area "already receiving electric service from another electric public utility", except where the existing service is inadequate or exorbitant, is to discourage wasteful *duplication* and harmful *competition*. These evils, of course, cannot result when one utility immediately and completely *supplants* the other in a designated territory, especially if the first utility's property is expropriated to the use of the newcomer and its right to operate is revoked. Clearly, the provision referred to is not concerned with the situation here presented.

The Louisiana Public Service Commission Order relied on is printed in the Record here (p. 40). It plainly

applies only to *voluntary* transfers, and not to the acquisition of a portion of a utility's property by eminent domain proceedings.

But, though neither the statute nor the Order, on its face, purports to inhibit the present condemnation, there is even stronger reason for so concluding. Indeed, both the Louisiana Constitution and the statutes governing it withdraw from the Public Service Commission all authority over utilities owned and operated by municipalities. Thus, the Constitution, Article 6, Section 7, after defining the powers of the Commission, provides:

> "Nothing in this article shall affect the powers of supervision, regulation and control over any street railway, gas, electric light, heat, power, water works, or other local public utility, now vested in any town, city, or parish government unless and until at an election to be held pursuant to laws to be hereafter passed by the Legislature, a majority of the qualified electors of such town, city, or parish, voting thereon, shall vote to surrender such powers. In the event of such surrender such powers shall immediately vest in the Louisiana Public Service Commission; provided, that where any town, city, or parish shall have surrendered as above provided, any of its powers of supervision, regulation and control respecting public utilities, it may in the same manner, by a like vote, re-invest itself with such powers."

Similarly, La. R. S. 45:1163-1164:

> "§ 1163. The [Louisiana Public Service] Commission shall excercise all necessary power and author-

ity over any street railway, gas, electric light, heat, power, waterworks, or other local public utility for the purpose of fixing and regulating the rates charged or to be charged by and service furnished by such public utilities.

"§ 1164. The power, authority, and duties of the commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by such public utilities.

"The provisions of this Section and R. S. 45:1163 shall not apply to any public utility, the title to which is in the state or any of its political subdivisions or municipalities." (Emphasis added).

Finally, it is well settled in the jurisprudence of the Louisiana Supreme Court that the Public Service Commission has no interest in, and no authority over, expropriation proceedings. *River & Rail Terminals v. Louisiana Ry. & Nav. Co.*, 171 La. 223, 130 So. 337 (1930); *Calcasieu & S. Ry. Co. v. Bel*, 224 La. 269, 69 So. (2d) 40 (1953); See *Illinois Central R. Co. v. Louisiana Public Serv. Com'n.*, 224 La. 279, 69 So. (2d) 43 (1953).

(2) The next contention is that, under the law of Louisiana, "intangible" and "movable" and "incorporeal rights" are not susceptible of expropriation (See Answer, Para. XVIII; R. 16). Though nothing is cited to support this bald assertion in the Answer, Petitioner later, in Brief, relied on the much quoted "Opinion" of

the Louisiana Attorney General (Appendix "B" of Petitioner's Brief here), written by one of his General Assistants, who merely declares the law without invoking either statute or decision, and referred to a wholly inapplicable statutory definition of "property." The provision cited, La. R. S. 19:1, is the first Section of "Part I." of the Title on expropriation of the Louisiana Revised Statutes of 1950, while Act 111 of 1900, relied on by the City, forms "Part III." of the same Title. Thus, it is wholly irrelevant to the case at bar that the Section espoused by Petitioner reads:

> "*As used in this Part*, the term 'property' means immovable property, including servitudes." (Emphasis added).

There is no other Louisiana statute purporting to prohibit the condemnation of "rights" or personal property. Certainly, the Constitution of the State does not. On the contrary, the provisions already quoted refer to the excercise of the power of eminent domain for the taking of "property", without qualification, and expressly advert to the condemnation of "vested rights" (See La. Const. 1921, Art. 1, § 2, Art. 4, § 15, quoted *supra*). Moreover, another statute, not applicable here because related to municipalities differently governed, expressly provides that cities ". . . may acquire by condemnation or otherwise, . . . public utilities within or without the corporate limits of the city . . ." (La. R. S. 33:621); and a great number of other Louisiana statutes (all apparently overlooked by the Attorney General) bely the statement that "the right of expropriation relates to

lands."[1] (Petitioner's Brief, Appendix "B", p. 26). It follows that, insofar as Act 111 of 1900 authorizes the expropriation of property of every kind, it conflicts with no Louisiana law, Constitutional or statutory.

D. *Applicability of Act.*

(1) The argument is put forward that, even if it might constitutionally so provide, Act 111 of 1900 does not, in fact, authorize the expropriation of a utility com-

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[1] See, e.g., La. R. S. 44:361 (B) (relative to the re-establishment of lost public records by use of abstractors' records, when efforts at amicable purchase fail):

"The parish governing authority may, in the event of a failure to agree upon a price, **expropriate** under existing laws **the right to copy** the abstracts, photographs and rectigraphs for the restoration of the public records." (Emphasis added).

La. R. S. 3:534 (relative to the powers of "farm products market facilities"):

"Facility created under the terms of this Part shall through the action of its board of directors, taken as provided in this Part, have power:

(1) To acquire by purchase, lease, **condemnation**, or otherwise, such land or interest in land, **or other property, real or personal**, as may be necessary in its opinion to the operation of the market . . . ." (Emphasis added).

La. R. S. 33:4167 relative to the acquisition by parishes of gas systems):

"Parishes . . . may **expropriate**, in the manner provided by law, **existing gas plants, gas wells, gas distribution systems, or other property**, within their respective boundaries, needed for the operation of the gas plants or distributing systems." (Emphasis added).

La. R. S. 29:65 (relative to expropriation for military purposes):

"The governor may institute **expropriation** proceedings in the name of the state for lands **or other property**, which, in the opinion of the governor and the adjutant general, are necessary for military purposes. The proceeding shall be in the manner and form provided by law in ordinary cases of expropriation."

pany's *right to operate*, but only its physical property (See Answer, Para. XVI; R. 15). We might be tempted to agree, saying: "Very well, we'll condemn the property and use it in our system. Let the company's privilege subsist; but, should they attempt to exercise it by installing new facilities, we shall, of course, expropriate them." It is a possible solution, but we do not think it was the result contemplated by the Legislature in enacting the statute. Rather, we suggest the authors of the law envisaged the cessation of the right with the expropriation of the physical property necessary to its exercise. Following the American tradition, they evidently contemplated the direct expropriation of the right to operate along with the physical property. As we have seen, such an intent would encounter no constitutional obstacle. The word "property" in La. R. S. 19:101, unqualified as it is, can properly be read to include the right of operation.

In any event, it is clear that Act 111 authorizes the expropriation by a municipality of all of the physical property of a utility company, and that end cannot be defeated by any theoretical difficulty over the susceptibility of the right of operation to condemnation. Obviously, the authors of the law were aware that the great majority, if not all, public utilities operate under franchises and they cannot be presumed to have written an unenforceable statute. It follows that the condemnation of the tangible property must be awarded, and it is of little moment to the City whether the privilege of the company is considered extinguished or not. The practical result is the same in either case.

(2). The second argument against the applicability of Act 111 of 1900, and the only obstacle mentioned by the District Judge (R. 50), is based on the failure of the City, in this instance, to demand condemnation of *all* the electric properties owned by the Company throughout the State, as allegedly required under the statute (See Answer, Para. XXII; R. 18).

It is true that La. R. S. 19:101 provides that "Where the same person is the owner . . . of more than one of any one kind of plant, the municipal corporation may not expropriate any one of the plants without expropriating all of the plants owned by the same person." But it would be preposterous to read this requirement without qualification. Suffice it to suggest the example of a utility company operating in several states. Obviously, the Section intends to prevent a municipality from expropriating only a part of the company's system *within its corporate limits.* As the author of a very comprehensive Annotation on this subject in the American Law Report says, citing many cases from other jurisdictions in support:

> "Since the purpose of taking the plant or other property of a public service corporation for operation by the public is the rendering of services to the people of a particular municipality or district, a taking of only so much property as is required for that purpose is commonly upheld." 173 A.L.R. 1362-1400 (1948), at 1373.

Under any other interpretation, the City would be compelled to condemn more property than it reasonably required, which is, of course, prohibited. La. C. C., Art.

2636; *Shreveport and R.R. Bal. R. Co. v. Hinds*, 50 La. Ann. 781, 24 So. 287 (1899); *Knox v. Louisiana Ry. & Nav. Co.*, 157 La. 602, 102 So. 685 (1925); *City of New Orleans v. Moeglich*, 169 La. 1111, 126 So. 675 (1930). In the instant case, since the City is seeking to condemn *all* of the company's facilities within the corporate limits, except only certain properties not wholly devoted to servicing the limited area involved, no sound objection can be made.

But, interposing an apparent obstacle where none would otherwise exist, the District Judge finds, though without hearing evidence on the subject and presumably relying only on the unverified statement to that effect in the Company's Memorandum (not in the Record here), that:

> "In 1900, when Act 111 was passed by the Louisiana Legislature, the operations of utilities serving the cities of the State of Louisiana were usually confined to the territorial limits of the municipalities." (R. 50).

And, on the basis of that assumption, the Court concludes:

> "The question presented by this litigation is whether the City, under Act 111 of 1900, may condemn, not the plant or plants with their accessories operated by the defendant utility, but whether the City may condemn only that portion of the defendant's system, the poles, the lines, etc., which service the newly annexed section of Thibodaux." (R. 50).

What the actual situation was in 1900, we have yet had no occasion to determine, but, even accepting the District Court's "finding", we submit that the question of the applicability of Act 111 of to the facts of the case at bar is not so difficult of resolution as to require "guidance from the Supreme Court of Louisiana" (R. 51). Indeed, the District Judge himself concedes that the confinement of utilities within the municipal boundaries was only "usual" at the time of the passage of the Act. (See first passage quoted *supra*). What of the other, more extensive utility systems? Were they intended to be exempted from the municipal power of eminent domain, merely because of their size? Such a solution gives little credit to the Louisiana Legislature. Moreover, the law is still very much on the books, having only recently been "re-enacted" by its incorporation in the 1950 revision of the Louisiana Statutes, and if it is to be given any application in this day of the large utility companies, it must be construed as we have suggested. The conclusion is obvious that Act 111 is applicable in the premises.

E. ***Alleged Defects in Petition for Expropriation.***

(1) Petitioner asserts that there was no finding of public necessity by the City to justify the expropriation (See Answer, Para. XVII; R. 15-16). But, under the Act the only requirement is that the expropriation be ". . . thought necessary for the public interest by the mayor and council of the municipality." R. S. 19:101. The Mayor and the two other members of the Board of Trustees, who constitute the Council of the City of Thibodaux, by all signing the Petition for Expropriation, solemnly concurred in the finding that the expropriation is

". . . necessary for the public interest" and ". . . necessary and in the public interest." (Petition, Arts. 7, 8; R. 6). These allegations in the very language of the Act, clearly satisfy the requirement.

The further claim that, regardless of the view entertained by the government of Thibodaux, the proposed expropriation is "in fact not necessary" raises no issue of law. If Petitioner chooses to press the point, it must do so on the trial, after the legal defenses have been disposed of.

(2) Finally, the Company complains that the City, in its petition for expropriation, makes no provision for certain elements of damage which would allegedly result from the taking of the property there described. (See Answer, Para. XIX; R. 16). Counsel apparently overlook the following allegation of the City's Petition:

> "Petitioner avers that the property herein sought to be expropriated should be adjudged to petitioner upon payment to defendants of the value thereof *plus all damages sustained in consequence of the expropriation.*" (Petition for Expropriation, Art. 10; R. 6-7. Emphasis added).

The offer is clearly sufficient. The sole remaining question is one of fact. On the trial, Petitioner will be given ample opportunity to prove the damages alleged, if they exist, and their extent.

* * * * * * *

A first reaction to the lengthy summary just concluded might be that the number, variety, and superficial

complexity of the state law issues involved, the many local statutes invoked by both parties, and Respondent's inability to refute any of Petitioner's arguments by simple reference to the authoritative decisions of the Louisiana Supreme Court—that all these factors combine to make it inadvisable for this Court, which should not *decide* the issues, to consider each of the questions raised and determine whether any of them is so difficult of resolution as to justify the District Court in remitting the controversy to the State tribunals. Certainly, it is with hesitation that we ask the Court to assume this laborious task. But, under a holding that the difficulty of the state law issues is the test of the propriety of applying the stay procedure, we see no alternative, unless the mere allegation that serious state law problems exist is to be accepted without examination.

In the instant case, however, the task is perhaps not so large as it might be in another matter. Indeed, basically, the only question is whether the City may expropriate certain utility properties under a statute clearly intended to grant the necessary power, which, on its face, is clear and unambiguous. That so many obstacles have been interposed is a tribute to the resourcefulness and ingenuity of counsel for Petitioner. That the arguments have not been disposed of by the State appellate tribunals is merely a consequence of their "originality", not their substantiality. Moreover, the Opinion of the District Court inferentially eliminates the great bulk of the "obstacles".

It only remains to suggest why the District Judge felt compelled to abdicate his authority. We respectfully offer the following three reasons:

1. The Judge relied heavily on the Opinion of the Attorney General of Louisiana, which has been sufficiently shown to rest on very weak foundations and to have been written in ignorance of Act 111 of 1900;

2. Based on a debatable assumption of fact, the Judge exaggerated the difficulty of applying the statute invoked to the present situation (See D(2), *supra*);

3. Having been corrected by this Court in *Leiter Minerals, Inc., v. United States*, 352 U. S. 220 (1957), where a stay of Federal Court proceedings was ordered because of the possibility of thereby avoiding a Federal Constitutional issue, the Judge misread that decision as approving recourse to such a procedure even when there is no substantial question under the U. S. Constitution.

II. Extent of Additional Delay in Final Disposition of the Case Which Would Result from Reinstatement of the Stay Order Entered by District Court.

Appealing only to equity and justice, we urge the Court to take note of the practical effect of a judgment affirming the District Court. It is sufficiently clear that in expropriation proceedings undue delays should be avoided if possible.

At the outset, it should be emphasized that there is no "short cut" to obtaining the views of the Louisiana Supreme Court required by the Order of the District

Court. The State Constitution grants our high court only appellate and supervisory jurisdiction, except for certain special matters not including expropriation or declaratory judgment actions. See La. Const. 1921, Art. 7, § 10, 11. With the exception of disbarment and judge removal proceedings, it can decide no controversy not previously adjudicated. See *Rapier v. Guidry*, 136 La. 443, 67 So. 322 (1915). Nor can it give "advisory opinions" or initial declaratory judgments. See *State ex rel. Bussie v. Fant*, 216 La. 58, 43 So. (2d) 217, 220 (1950); *Weber v. H. G. Hill Stores*, 207 La. 500, 21 So. (2d) 510, 511 (1945); *Graham v. Jones*, 198 La. 507, 3 So. (2d) 761, 792 (1941); *State ex rel. Day v. Rapides Parish School Board*, 158 La. 251, 103 So. 757, 760 (1925). The Louisiana Supreme Court will only pass on the issues presented by the declaratory action suggested after the case has been heard and determined by the State District Court.

While there is of course no way of accurately predicting the period of time required to run the gamut of the Louisiana courts, we have endeavored to obtain as precise an estimate as possible and submit it to the Court. From the current status of the docket of the 17th Judicial District Court it appears that the declaratory action suggested by the Order of the United States District Court could not be decided before January, 1960, at the earliest. And our information is that an appeal filed at that time would not, in the normal course of events, be determined before April, 1961. Thereafter, the case must return to the Federal District Court and run the course of the Federal appellate procedure. Thus, even assuming the full co-operation of all parties, a minimum of 23

additional months would probably be involved in satisfying the Federal District Court's Order.

On the contrary, *all of this delay* can be avoided if the Court of Appeals is affirmed and the District Judge is directed to himself proceed to a decision of the issues, all of which have already been briefed for his consideration.

A third alternative has been suggested: remand of the *entire* case to the State court. While, presumably the same 23 months would be required to obtain a final judgment from the Louisiana Supreme Court, at least there would then be no return to the Federal Courts, except only possibly to this Court in the unlikely event of its choosing to review the case on the merits. This solution would certainly shorten the delay for decision and is one to which the City of Thibodaux, Respondent, would have no serious objection. But there may be a question whether this Court can properly *remand* a case properly before the United States Courts. Indeed, 28 U.S.C.A., § 1447(c) provides for the remand of a removed case only:

> "If at any time before final judgment it appears that the case was removed improvidently *and without jurisdiction* . . ." (Emphasis added).

Clearly, the Federal was *not* "without jurisdiction." On the other hand, the device of "remitting the parties" to the state court is, in a case such as this, nothing less than an indirect (and more time consuming) "remand", and if the Federal Courts are empowered to take this action, there is no sound reason why the more straightforward remand procedure should not be authorized.

CONCLUSION.

For the foregoing reasons and for those given in its Original Brief, Respondent, City of Thibodaux, prays that the judgment of the Court of Appeals be affirmed and that this cause be remanded to the District Court with directions to recall the stay order issued herein and to proceed with all deliberate speed to a decision of all issues in the case; or, in the alternative, that the District Court be directed to recall the stay order and remand the whole case to the 17th Judicial District Court for the Parish of Lafourche of the State of Louisiana.

Respectfully submitted,

THEO. F. CANGELOSI,
Special Counsel,
612 North Boulevard,
Baton Rouge, La.;

LOUIS FENNER CLAIBORNE,
Special Counsel,
304 Marine Building,
New Orleans 12, La.;

REMY CHIASSON,
City Attorney,
City Hall,
Thibodaux, La.,
Attorneys for Respondent.

CERTIFICATE OF SERVICE.

I hereby certify that copies of the foregoing brief have been served on Peltier & Peltier, Harvey Peltier, and Monroe & Lemann, J. Raburn Monroe, Andrew P. Carter, the attorneys for Louisiana Power & Light Company, petitioner, by depositing the same properly addressed, first class postage prepaid, in the United States Mail, on this _____ day of April, 1959.

_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 398

LOUISIANA POWER & LIGHT COMPANY,
Petitioner,

versus

CITY OF THIBODAUX,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION FOR LEAVE TO FILE REPLY BRIEF TO RESPONDENT'S SUPPLEMENTAL BRIEF AND REPLY BRIEF FOR LOUISIANA POWER & LIGHT COMPANY, PETITIONER.

PELTIER & PELTIER,
Harvey Peltier, Donald L. Peltier;
MONROE & LEMANN,
J. Blanc Monroe, Monte M. Lemann,
J. Raburn Monroe, Malcolm L. Monroe,
Melvin I. Schwartzman,
Andrew P. Carter,
1424 Whitney Building,
New Orleans 12, Louisiana,
Attorneys for Louisiana Power & Light Company, Petitioner.

SUBJECT INDEX.

CITATIONS.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Louisiana Power & Light Company, Petitioner, through its undersigned counsel, begs leave of Court to file the within Reply Brief to Respondent's Supplemental Brief, which Supplemental Brief Respondent was per-

mitted by order of this Court to file subsequent to oral argument, and which Supplemental Brief covers points not heretofore covered by briefs or oral argument.

PELTIER & PELTIER,
Harvey Peltier, Donald L. Peltier;
MONROE & LEMANN,
J. Blanc Monroe, Monte M. Lemann,
J. Raburn Monroe, Malcolm L. Monroe,
Melvin I. Schwartzman,
Andrew P. Carter,
1424 Whitney Building,
New Orleans 12, Louisiana,
Attorneys for Louisiana Power
& Light Company, Petitioner.

By _____
J. RABURN MONROE

CERTIFICATE OF SERVICE.

I hereby certify that copies of the foregoing Motion have been served on Theo. F. Cangelosi, Louis Fenner Claiborne, and Remy Chiasson, attorneys for the City of Thibodaux, Respondent, by depositing the same properly addressed, first class postage prepaid, in the United States Mail, on this 28th day of April, 1959.

_____
J. RABURN MONROE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

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REPLY BRIEF OF LOUISIANA POWER & LIGHT COMPANY, PETITIONER, TO THE SUPPLEMENTAL BRIEF FOR THE CITY OF THIBODAUX, RESPONDENT.

I.

MERITS OF LEGAL DEFENSES NOT HERE AT ISSUE.

Respondent, in its Reply Brief filed some two weeks after oral argument, has proceeded to argue the

merits of the legal defenses raised by Louisiana Power & Light Company in the District Court. The merits of these legal defenses were not passed on by the District Court, which simply issued its stay order pending an interpretation of Act 111 of 1900 by the Courts of Louisiana. The merits of these legal defenses were never briefed or argued in the Court of Appeals, and were never passed on by the Court of Appeals for the Fifth Circuit, were never discussed or argued in the briefs filed with this Court prior to oral argument, and on oral argument were merely enumerated and not discussed in detail or argued. The merits of these legal defenses are not now a part of this appeal, and have never been. Before this Court should undertake to determine the merits of these legal defenses, it should, as the District Court held, have the benefit of the interpretation of the statute by the State Supreme Court, and even if this Court should hold that the District Court was wrong in issuing its stay order, before determining these issues this Court should at least have the benefit of the views of the District Court and the Court of Appeals. Further, it is submitted that counsel for the Petitioner should have the opportunity to present oral argument on all these issues before this Court attempts to pass on them.

The sole issues before this Court are:

1. Whether the District Judge, in an action at law, was exercising his discretion as a court of law in granting the stay order, in which case his order would be an interlocutory order which is not appealable under Section 1291 of the Judicial Code (28 USC 1291); or

2. Whether, if the District Judge so far exceeded his discretion as a court of law as to constitute his stay order an injunction, such order was proper under all the circumstances.

This Court has upheld stay orders in cases involving diversity of citizenship.[1] Stay orders have also been upheld in suits at law.[2] Although Petitioner asserts that there is here involved a substantial constitutional question, nevertheless, the existence of a substantial constitutional question has not been held necessary to justify the stay order.[3] Nor is it necessary that there be an interference with the State administrative processes,[4] or that there be a pending State Court proceeding.[5]

Since the decision in the case of *Erie Railroad Co. v. Tompkins*, 304 U. S. 464 (1938), none of these factors

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[1] Spector Motor Company v. McLaughlin, 323 U. S. 101; Railroad Commission v. Oil Co., 310 U. S. 573; Burford v. Sun Oil Co., 319 U. S. 315; Alabama Commission v. Southern Railway Co., 341 U. S. 341; Chicago v. Fieldcrest Dairies, 316 U. S. 168. See concurring opinion of Justice Frankfurter in Sutton v. Leib, 342 U. S. 402, 412 (1951). Noteworthy here is the fact that Petitioner which originally invoked the diversity jurisdiction has no objection to having the State Court pass on the questions of State law, whereas Respondent which filed suit originally in State Court now objects to that Court passing on such questions.

[2] Leiter Minerals, Inc., v. United States, 352 U. S. 220; Thompson v. Magnolia Petroleum Co., 309 U. S. 478. See cases cited in Petitioner's original brief and petition for certiorari.

[3] Leiter Minerals, Inc., v. United States, 352 U. S. 220; Thompson v. Magnolia Petroleum Co., 309 U. S. 478; Chicago v. Fieldcrest Dairies, 316 U. S. 168 (Constitutional question lurking but not substantial). See dissent of Justice Frankfurter in Propper v. Clark, 337 U. S. 472.

[4] Leiter Minerals, Inc., v. United States, supra; Thompson v. Magnolia Petroleum Co., supra; Kansas City Southern Ry. v. United States, 282 U. S. 760.

[5] Leiter Minerals, Inc., v. United States, supra; Railroad Commission v. Pullman Co., 312 U. S. 495; Spector Motor Co. v. McLaughlin, supra; Government Employees v. Windsor, 353 U. S. 364.

are or should be determinative in passing on the propriety or legality of a stay of proceedings pending determination of State law issues by State courts. We submit that the major consideration is the proper interrelated functioning of the State and Federal court systems. As Justice Frankfurter stated in his dissenting opinion in the case of *Propper v. Clark*, 337 U. S. 472 (1948):

> "So here, though no constitutional issue is present, regard for the respective orbits of State and federal tribunals is the best of reasons, as a matter of judicial administration, for requiring a definitive adjudication by the New York courts rather than proceeding on the basis of our own tentative guess as to the meaning of the New York statutes. That federal issues may remain is no justification for refusing to submit to the New York courts a separable issue of New York law."

And as Justice Douglas said, in the case of *Chicago v. Fieldcrest Dairies, Inc.*, 316 U. S. 168, 172 (1941):

> "Considerations of delay, inconvenience and cost to the parties, which have been urged upon us, do not call for a different result. For we are here concerned with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole."

Here we are confronted with the interpretation of a State statute, upon the validity and interpretation of which the City's right to proceed alone depends. This statute is 59 years old and has never been passed upon by any State court of record. The only guidepost is an

opinion of the Attorney General to the effect that the City has no right to expropriate the property such as here involved, an opinion given 51 years after the passage of the statute. This would appear to be a particularly appropriate occasion for the Federal Court to stay its hand pending a determination by the State Court.

II.

MERITS OF THE LEGAL DEFENSES.

Counsel for Respondent, without any basis, makes the assumption that the only reason that the District Court entered the stay order was because the issues of State law were difficult, and, using this as a springboard, dives into the merits of these legal defenses in an attempt to show that none of them are difficult of resolution. As pointed out above, none of these legal defenses were passed on by the District Court, briefed or argued before the Court of Appeal, passed on by the Court of Appeal, or briefed or argued before this Court, and in fact constitute no part of this appeal. The net result of counsel's argument is to urge this Court not only to tell the District Judge to decide issues of State law, but how to decide them. We submit that the length at which counsel has argued that the issues are not difficult alone demonstrates that they are. We believe that the finding of the District Court on this matter is sufficient unto itself, and we do not believe that argument of the issues here is proper. However, inasmuch as counsel has argued the issues, we will make a brief response in case the Court should be interested in our views.

When the District Court suggested that the legal defenses raised be argued prior to the trial of the question of compensation, counsel for Defendant (Petitioner here) pointed out that in connection with these defenses, consideration of certain factual material was necessary. The Court suggested that this be handled by stipulation and affidavit. An affidavit of W. O. Turner appears at page 20 of the Transcript, and a stipulation of counsel appears at page 26 *et seq.* In addition, prior to the argument in the District Court, Defendant filed a lengthy memorandum brief which set out a great deal of additional factual material, and which memorandum brief **was verified** as to the factual statements by the affidavit of W. O. Turner, President of Defendant, Louisiana Power & Light Company. This memorandum brief was before the District Court and given consideration by it. But this memorandum brief is not part of the record before this Court in this case. No opposing affidavits were filed by the City of Thibodaux.

We will discuss briefly some of the legal defenses urged by the Defendant below, Petitioner here.

(1) **Opinion of the Attorney General.**

The Opinion of the Attorney General, dated October 10, 1951, appears in Appendix B to Petitioner's brief, and a consideration of it will show that it clearly covers the identical situation here involved. The Respondent's answer is that the Attorney General must have overlooked the existence of Act 111 of 1900. This would appear to be an entirely unwarranted assumption, particularly as the statute in question has been incorporated

in the Revised Statutes of 1950 under Title 19—"Expropriation," and immediately follows the general expropriation provisions of Louisiana law as Part 3 of that Title. The fact that no expropriation has ever been attempted under the statute lends additional weight to the Attorney General's Opinion.

(2) **Necessity for Certificate of Public Convenience and Necessity.**

Respondent has set out, on page 17 of his Supplemental Brief, the language of Louisiana Revised Statutes 45:123 prohibiting any electric public utility to extend its services or facilities to customers already receiving electric service from another electric public utility without first obtaining a Certificate of Public Convenience and Necessity. Also, the order of the Public Service Commission prohibiting transfers of utility property without its consent, is set out in the record at page 40. The term "electric public utility", as used in R. S. 45:123, quoted by the Respondent, is defined in *R. S. 45:121* as follows:

> "The term 'electric public utility' as used in this Chapter, means any person furnishing electric service within this State, the Parish of Orleans excepted."

In an opinion dated January 23, 1957, relative to R. S. 121 through 123 of the Revised Statutes, the Secretary of the Louisiana Public Service Commission states:

> "The Commission has always considered the term 'any person' would include a municipal corporation as well as a private corporation and has acted on that presumption."

All of this takes on added significance when it is appreciated that the residential rates charged by the City of Thibodaux are 58% higher than those charged by the Defendant, Louisiana Power & Light Company, so that the rates of the customers who would be taken over, were the attempted expropriation successful, would be immediately raised by 58%. Also of significance is the fact that customers in this area have filed a petition with the Public Service Commission asking that Louisiana Power & Light Company be ordered to continue service to them at present rates. This petition is presently pending before the Commission. Also significant is the fact that whereas in other sections of the Revised Statutes relating to the powers of the Public Service Commission, it is stated that the sections do not apply to municipalities, this is not stated in connection with R. S. 45:121 through 123.[6]

(3) **Expropriation of Franchise Not Authorized by Statute.**

Even if R. S. 19:101 were construed to be valid and applicable, as applied to the present attempt of Respondent to expropriate Petitioner's properties, it clearly does not authorize Respondent to expropriate "any and all rights or privileges the defendant may have to operate within the said city." The relevant language of *Section 101 of the Act* is:

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[6] The Louisiana Constitution of 1921 vested all regulatory authority over public utilities in the Public Service Commission except that it reserved to municipalities the powers they then had as of 1921 and no more. It is entirely consistent with these Constitutional provisions that the Public Service Commission have jurisdiction as to proposed extension of municipal systems into areas over which the Commission was given regulatory authority by the 1921 Constitution.

> "Any municipal corporation * * * may expropriate any electric light, gas or waterworks plant or property."

It then provides that the petition for expropriation describe "the property necessary for the municipal purpose, with a detailed statement of the buildings, machinery, appurtenances, fixtures, improvements, mains, pipes, sewers, wires, lights, poles, and property of every kind connected therewith."

Title 33, Section 4361 specifically grants to police juries the right to grant franchises over the public roads and streets of their respective parishes not within the limits of any municipality. The Police Jury of Lafourche Parish has granted to Petitioner valid franchises under this section, including the right to serve in the area here involved. In order for a municipality inside a parish to expropriate rights granted by the policy jury of the parish, clear and explicit statutory authorization would be required. No such authorization is contained in R. S. 19:101, nor in the general expropriation provisions of Title 19, Section 1, *et seq.*

It is to be borne in mind that the City does not need this franchise in order to operate in the area sought to be expropriated within its limits, since it already has this right, and since Petitioner's franchise is non-exclusive. It needs the franchise only to obtain a monopoly and permit it to raise the rates, and, as set out above, the statute gives it no such authority to take this franchise.

(4) No Finding of Necessity for This Expropriation.

Even if Title 19, Section 101 were held constitutional as applied to this proceeding, it is only applicable "whenever such a course is thought **necessary**" and requires the petition to describe "the property **necessary** for the municipal purpose." A careful consideration of the ordinance of the City of Thibodaux of November 27, 1956, purportedly authorizing the institution of this action, reveals that nowhere does the Commission find the taking **necessary for the public interest.**

And, indeed, the taking of this property is not necessary. As set out in the Statement of Facts, the municipal electric system, having rates some 58% higher than those of Petitioner for residential service, operates at a profit, which is used for other municipal purposes. The only reason for taking this property is the desire on the part of the City to increase this profit. In its prospectus issued in connection with the sale of $2,600,000.00 of Revenue Bonds on Thursday, July 12, 1956, the City states, on page 12:

> "Certain fringe areas of the City contain approximately 530 electric consumers who are now being served directly by the Louisiana Power & Light Company. The City proposes to acquire this additional retail service area by purchasing the Power Company's distribution facilities and to connect these facilities to the Municipal Electric System. Funds from the bond issue now offered for sale will pay for these facilities, and a preliminary survey indicates that the value of these facilities, on a basis of reproduction-cost-new-less accrued depreciation, is between $100,000.00 and $125,000.00.

The City can negotiate freely with the Power Company, since the connection of this new area to the Municipal System is not essential to provide adequate debt-service coverage for the present bond issue." (Emphasis ours).

Municipalities in Louisiana are limited by the Constitution as to what taxes they may or may not levy. See in this connection, *Louisiana Constitution, Article XIV, Section 12; Article X, Sections 1, 5 and 6.* Far from this expropriation being necessary, the City is in fact seeking to circumvent the constitutional limitations on its taxing power by raising the rates to consumers in the area sought to be expropriated and appropriating to itself the profits ensuing therefrom. We suggest that this is not an appropriate or authorized form of taxation and is not in the public interest.

(5) No Authority For the Expropriation of a Portion of a System.

Even if Act 111 of 1900 were to be considered standing alone, the precise wording does not authorize the taking of a portion of a plant or distribution system. It clearly contemplates the taking over of the entire plant. In fact, it recognizes the inappropriateness of taking a portion of a property when it specifically requires that where the same person owns both gas, electric light and waterworks plants, or more than one kind of plant, "the municipal corporation may not expropriate any of the plants without expropriating all of the plants owned by the same person."

An expropriation such as here attempted was not contemplated by the authors of this bill. At the time of the

passage of the Act, large central station service of many communities from one power source through integrated transmission systems was unknown. In the state of the art at that time, each community which had electric service had its own small local plant. The bill was introduced by Mr. Russell, a Senator from Monroe, Louisiana, and undoubtedly had reference to a plant in that city. Monroe did not acquire a municipal plant until 1921, and then apparently not through expropriation. Our research has revealed no case in which any expropriation was made or undertaken prior to this suit under Act 111 of 1900. Louisiana Power & Light Company is, for the most part, a rural electric utility, distributing electricity generated at remote central stations and transmitted at high voltage to various service areas. Its customer density is, of course, the greatest in the suburbs and fringes of incorporated cities. If Act 111 were interpreted to permit the piecemeal dismemberment of the principal service areas, and such process proceeded, the Company could well be left with generating stations and transmission lines but without customers. The Act, which clearly contemplates the taking of an entire plant, should not be so extended.

(6) Creation of a Prohibited Monopoly.

In the alternative, Petitioner has contended, in Article XIV of its answer, that the attempt by Respondent to expropriate "any and all rights or privileges the defendant may have to operate the same within the said city" violates Section 14 of Article XIX of the Louisiana Constitution and is in derogation of the obligation imposed on the Louisiana Legislature by Section 5 of Article XIII of said Constitution.

Section 14 of Article XIX of the Louisiana Constitution is the anti-monopoly and anti-restraint of trade section. Since the Respondent already provides the gas service in the City of Thibodaux, its present attempt to expropriate not only Petitioner's electric facilities therein (which would be entirely sufficient to allow it to operate an electric utility in the territory affected) but also "any and all rights or privileges the defendant may have to operate the same within the said city" obviously evidences that the City is here seeking to establish a monopoly of (For definition of a monopoly see *Tooke & Reynolds v. Bastrop*, 172 La. 781, 791, 135 So. 239 (1931); *State v. American Sugar Refining Co.*, 138 La. 1005, 1019, 71 So. 137 (1916)), and the ability to restrain trade in, the electric and gas utility business in the City. (For applicability of constitutional prohibitions to utility services, see *Texas & Pacific Ry. Co., et al., v. Southern Pacific Ry. Co.*, 41 La. Ann. 970 (1889)). The present action would, therefore, on its face appear clearly to be in violation of the anti-monopoly and anti-restraint of trade provisions unless factors peculiar to the instant situation remove it from the application and operation of these constitutional provisions. Are such factors present here? Petitioner submits the factors peculiar to the instant situation show that these constitutional provisions are applicable here and that the application of them is highly desirable.

In exercising the functions of a gas and/or electric utility, the City of Thibodaux, because it is a municipality, is not subject to regulation and supervision by the Louisiana Public Service Commission (R. S. 45:1164) or any other regulatory body, although in so doing the City of Thibodaux is exercising proprietary, rather than

governmental, functions. *Higginbotham v. Public Belt Ry. Com.*, 181 So. 65 (rehearing denied 181 So. 221), affirmed 192 La. 525, 188 So. 395. See *Farmerville v. Commercial Credit Co.*, 173 La. 43, 55, 136 So. 82 (1931). Therefore, when the City seeks to expropriate not only the electric distribution system of Petitioner within the portion of the City herein involved, but also any and all rights or privileges the Petitioner may have to operate same within the City, the Respondent is seeking to obtain for itself a utility business monopoly in the exercise of which it would not be subject to regulation or supervision by any public body. This is clearly abhorrent to the public policy expressed in Section 14 of Article XIX of the Louisiana Constitution. As might be expected, one immediate result of permitting the Respondent to succeed in the instant action, as set out in the Statement of Facts, would be that the present customers of Petitioner who would then become customers of Respondent would immediately be required to pay considerably higher prices for their electricity.

As Respondent itself alleges in Article 5 of its petition, Respondent is presently serving gas in that portion of the City where it now seeks to expropriate Petitioner's electrical facilities. Gas competes with electricity. And Petitioner's electric operations in that portion of the City of Thibodaux where it operates are conducted both under a non-exclusive franchise and under the regulation and supervision of the Louisiana Public Service Commission. But if the Respondent is permitted to succeed in this action, then one owner owns, operates and **exclusively** controls all gas and electric services in the City, as it pleases, subject to no regulation or super-

vision by any regulatory body. Trade is restrained. Monopoly is effected.

It is submitted, therefore, that the "relief" sought by the Respondent in the instant action would be in violation of Section 14 of Article XIX of the Louisiana Constitution, and should be denied.

(7) **Constitutional Questions**

Constitutional questions, of course, would not be reached if any of the above mentioned legal defenses were resolved against the City, and, as set out above, since these defenses all involve a matter of interpretation of State law of first impression, it is most appropriate that the Federal Court stay its hand until the State Court has passed on them. The Constitutional issues arise under the obligation of contract clause and the due process clauses of the United States and the Louisiana Constitutions, and in summary are based on the following facts:

(1) Petitioner holds three valid subsisting franchises from the Parish of Lafourche (Tr. pp. 27, 30, 32).

(2) In February, 1947, the City entered into a written agreement with the Petitioner, recognizing these rights (Tr. p. 36). Although Respondent does not admit the validity of this contract, Petitioner contends that it is a valid contract and hence, for the purposes of consideration of this argument, it must be assumed to be a valid contract.

(3) In 1954, in connection with the extension of the corporate limits of Thibodaux, the City officials gave

a public assurance that no change would be made in the electric service in the area to be added to the corporate limits. This constituted a further affirmance of Petitioner's vested rights.

(4) In reliance on its franchise and contract rights, Petitioner expended money, constructed a transmission and distribution system, enlarged its generating capacity, and entered into various obligations.

Petitioner relies in part on the following cases:

City of New Orleans v. Great Southern Telephone and Telegraph Co., 40 La. Ann. 41, 3 So. 555;

East Louisiana Railroad Co. v. City of New Orleans, 46 La. Ann. 526, 15 So. 157;

Kennon v. Hilburn, 144 La. 131, 80 So. 224 (1918);

Shreveport Traction Co. v. City of Shreveport, 122 La. 1, 47 So. 40;

Lake Charles Ice, Light & Waterworks Co. v. City of Lake Charles, 106 La. 65, 30 So. 289;

Jefferson City Gas Light Co. v. City of New Orleans, 41 La. Ann. 91, 5 So. 262.

We are presented here with a situation of a lesser subdivision seeking to expropriate a right granted by a larger subdivision—the City seeking to expropriate a right granted by the Parish within which it is located. The franchise, when granted, was not burdened with an exposure to expropriation by the City. We also have here a city acting in its proprietary capacity. In the case of *West*

River Bridge Company v. Dix, 6 Howard 793, cited by Respondent, Judge M'Lean states, at page 801, as follows:

> "No State could resume a charter, under the power of appropriation, and carry on the functions of the corporation. A bank charter could not be thus taken, and the business of the bank continued for public purposes. Nor could this bridge have been taken by the State, and kept up by it, as a toll-bridge. This could not be called an appropriation of private property to public purposes. There would be no change in the use, except the application of the profits, and this would not bring the act within the power. The power must not only be exercised bona fide by a State, but the property, not its product, must be applied to public use."

In conclusion, we submit that the legal defenses raised by Petitioner's answer in the Court below not only present serious questions but questions which in Petitioner's opinion will prove fatal to Respondent's success in this proceeding. Certainly, they cannot be brushed aside as entirely without merit, as an afterthought by counsel for Respondent, after conclusion of oral argument before this Court.

III.

DELAY.

We submit that the delay to date in this case has been primarily the fault of Respondent. The record shows that the original petition was originally served on February 7, 1957. Defendant promptly removed the case on February 14, 1957, and filed its answer on February 19, 1957, without asking any extension of time for pleading,

which is normally granted as a matter of course in such cases. The pre-trial conference was not arranged by plaintiff until May 15, 1957. The case was heard on the legal defenses on June 12, 1957. The District Court entered its decision promptly on June 21, 1957, and entered its order on June 25, 1957. The plaintiff could at this time have started its declaratory judgment proceeding, which by this time would undoubtedly have been completed. Instead, it waited until July 23, 1957, to file a notice of appeal, and until August 22, 1957, to file its designation of contents of the record. After judgment of the U. S. Court of Appeals on April 18, 1958, Petitioner promptly filed petition for rehearing on May 8, 1958, and after the denial of the rehearing on July 15, 1958, promptly filed its petition for certiorari.

Petitioner has assured this Court that if the stay order of the District Court is affirmed, it will cooperate in any and every way in expediting the declaratory judgment proceeding.

As Respondent correctly states, there is no way of accurately predicting the period of time required to go through the Louisiana courts, but we submit that counsel's estimate is on the upper limit, particularly as the statute here involved provides for summary procedures. In the meantime, there is no damage being incurred by the City in connection with the matter.

IV.

CONCLUSION.

In conclusion, we submit that the merits of the legal defenses raised under State law have not been placed at issue on this appeal and therefore should not be con-

sidered and determined by this Court, and that such defenses are plainly on their face serious and substantial. Any delay that might be involved in following the declaratory judgment procedure suggested by the District Court would not appear serious, particularly as no damage or injury is being suffered by the City in the meantime. Since we have here serious questions concerning the validity, applicability and interpretation of a State statute purportedly delegating to cities some of the sovereign rights of eminent domain, and since this statute has never been interpreted by any State Court decision, regard for the respective orbits of State and Federal tribunals, and consideration of the appropriate relationship between Federal and State authorities functioning as a harmonious whole, amply justify the action of the District Court in issuing its stay order, and that Court's action should be affirmed and the judgment of the Court of Appeals reversed.

Respectfully submitted,

PELTIER & PELTIER,
Harvey Peltier, Donald L. Peltier;
MONROE & LEMANN,
J. Blanc Monroe, Monte M. Lemann,
J. Raburn Monroe, Malcolm L. Monroe,
Melvin I. Schwartzman,
Andrew P. Carter,
1424 Whitney Building,
New Orleans 12, Louisiana,
Attorneys for Louisiana Power & Light Company, Petitioner.

By:_____

CERTIFICATE OF SERVICE.

I hereby certify that the above and foregoing brief has been served on opposing counsel on this day of April, 1959.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 398

LOUISIANA POWER & LIGHT COMPANY,
Petitioner,

versus

CITY OF THIBODAUX,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

THEO F. CANGELOSI,
Special Counsel,
612 North Boulevard,
Baton Rouge, La.;
LOUIS FENNER CLAIBORNE,
Special Counsel,
304 Marine Building,
New Orleans 12, La.;
REMY CHIASSON,
City Attorney,
City Hall,
Thibodaux, La.,
Attorneys for Respondent.

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PETITION FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of City of Thibodaux, Respondent, through its undersigned counsel, with respect represents that a rehearing should be had in this cause, for the following reasons:

1. The Decision Is in Direct Conflict with County of Allegheny v. Mashuda Co., Decided the Same Day.

In *County of Allegheny v. Mashuda Co.*, No. 347, decided June 8, 1959 (CCH Sup. Ct. Bull., Current Term, p. 1375; 27 LW 4361), the Court (Mr. Justice Clark, with whom Justices Black, Frankfurter and Harlan, dissenting) expressly holds that a Federal District Court may abstain from deciding a state law issue in a case of which it has jurisdiction, and remit the parties to the state tribunal for the resolution of that question, *only* in two situations: 1) When that procedure results in avoiding, or at least postponing, decision of a serious Federal constitutional issue; or, 2) When such a course is necessary to avoid the hazards of needless friction with state policies. In deciding that neither of these "countervailing interests" were present in that case to justify abstention, the Court specifically rules that the use of the Federal forum to adjudicate issues in an eminent domain proceeding under state statutes does *not* involve any danger of "friction with state policies."

Yet, here, a majority of the Court holds that a similar eminent domain proceeding should not be determined by the Federal Court, but that the local law issues should be referred to the state courts for resolution. And the basis for the decision is emphatically stated to be that eminent domain is so "intimately involved with sovereign prerogative" that determination of state law questions arising in a suit of this "special and peculiar nature" by the Courts of the United States would create

"needless friction between state and federal authorities." [1] This holding is directly contrary to that in *Mashuda* and there is no possible reconciliation.[2]

Indeed, seven members of this Honorable Court evidently agree with our conclusion. Those who dissented in *Mashuda* are consistent in joining the majority here, as are those who dissented here and subscribed to the Opinion of the Court in *Mashuda*. But we are frankly at a loss to understand the position of the two Honorable members who justify abstention here and not in *Mashuda* (though the reverse would seem more plausible, as hereinafter explained). The Concurring Opinion here, it is true, offers an explanation. It is said that the two cases are "totally unlike"; but, insofar as the availability, or propriety of applying, the doctrine of abstention, like a majority of the Court, we can see no difference, at least none that would favor its use here rather than there. The Concurrence adds, however, that, while here the controlling statute is "of highly dubious meaning", in *Mashuda* the

[1] We take it that no one, in this case, would justify the stay order on the ground of thereby avoiding a substantial Federal constitutional question, for, as the Dissenting Opinion remarks (p. 3): "The suggestion that federal constitutional questions lurk in the background is so patently frivolous that neither the District Court, the Court of Appeals, nor this Court considers it to be worthy of even passing reference."

[2] The other decision in this field handed down the same day, **Martin v. Creasy**, No. 157 (CCH Sup. Ct. Bull., Current Term, p. 1347; 27 LW 4354), presents no difficulty. For, there, unlike both **Mashuda** and this case, the suit was to enjoin enforcement of a state condemnation statute on Federal constitutional grounds, and the dismissal of the complaint was required in order to give effect to the two "countervailing interests" recognized as sufficient to justify abstention, avoidance of needless friction between Federal and state authorities, and postponement in the decision of a Federal constitutional question prematurely presented.

law was clear. Though we cannot, at this late date, expect to persuade the Court that the interpretation of the state law in this case is a relatively easy task in which predicting the view of the state Supreme Court is far simpler than in *Mashuda*, where a long series of apparently conflicting state court decisions had to be untangled, we find it impossible to believe that the author of the Concurring Opinion would establish as a criterion for resort to the abstention procedure the difficulty of the state law issues to be resolved. Such a proposition would be too patently contrary to the emphatically reiterated pronouncements of this Court. See cases cited on pages 9 and 10 of the Dissent herein.

If any basis of distinction between the two cases is to be made, surely it must result in applying the doctrine of abstention in *Mashuda* rather than here. Indeed, there, as the Dissenting Opinion points out, the continuance of the case in the Federal Court may well inhibit the concurrent state court proceeding, initiated first, and will certainly lead to no elimination of delay. Here, on the contrary, there is no state action pending and, therefore, no possibility of "friction." Moreover, in this case, no one denies that a determination by the Federal Court would save considerable time and labor.

In conclusion on this point, we must, with respect, suggest that by deciding these two cases in exactly opposite manner the Court has left Judges and lawyers without any clear guide. Instead of clarifying a somewhat doubtful question (which was presumably the real object of granting Certiorari in these matters), the Court has announced two contradictory rules which can but confuse

those charged with the responsibility of deciding when to remit a controversy to state tribunals. Inevitably, if it does not do so here, the Court will be compelled to reconsider the issue in another case. We beg the Court not to pass the opportunity of settling this important question now.

2. The Decision Is in Direct Conflict with the Established Jurisprudence of the Court.

The Dissenting Opinion having so ably and so thoroughly exposed the conflict between the instant decision and the established jurisprudence of the Court as to the proper application of the doctrine of abstention, it would be presumptious for us to do more than attempt to summarize here the points of contradiction:

A. While the Court had never authorized a District Court to abstain from deciding state law issues in a case of which it had jurisdiction unless such a procedure was required by the policy of avoiding unnecessary decision of federal constitutional questions or the policy of avoiding needless friction between Federal and state authorities, *here* a stay order is approved despite the fact that neither of these countervailing interests is present.

B. While the Court had never before held that determination of state law issues by a Federal Court involved a sufficient threat of friction with state policies to justify remitting the parties to the local tribunal except in equitable proceedings aimed at enjoining the enforcement of a state law or directly interfering with the act of a state officer or court, *here* the Court rules that the mere interpretation and application

by a Federal Court of a state law, at the request of the party representing the state, presents such a threat, even though the act of no state official is sought to be enjoined and no pending state court proceeding is to be disturbed.

C. While the Court had consistently held heretofore that mere difficulty in interpreting state statutes and the absence of guidance from the state appellate courts did not justify abstention by Federal Courts, since the diversity jurisdiction was not conferred on the courts of the United States for their benefit but for that of the litigants, *here* the lack of authoritative decisions by the state courts is found to justify such an abdication of power by the Federal Court.

D. While the Court, or members thereof, despite expressed repugnance for diversity jurisdiction,[3] had con-

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[3] In addition to the decisions cited in the Dissenting Opinion here and in Respondent's Original and Supplemental Briefs, attention should be focused on both the Court's Opinion and the Concurring Opinion in **Lumbermen's Mutual Casualty Co. v. Elbert, 348 U. S. 48, 53 (1954)**. The Court there rejects the suggestion that Federal Courts should, as a matter of discretion, decline to exercize diversity jurisdiction, as in **Burford v. Sun Oil Co., 319 U. S. 315 (1943)**, saying (at 53):

> "But in Burford, jurisdiction was declined to avoid a potential interference with a state's administrative policy-making process, a consideration not present here. Moreover, traditional equitable authority, not available here, was relied upon to justify the holding."

The Concurring Opinion of Mr. Justice Frankfurter, while a strong indictment of diversity jurisdiction, the "stuff" of which "is state litigation", "controversies concerning matters which in themselves are outside federal power and exclusively within state authority", nevertheless, recognizes that it is "not . . . appropriate now to question Meredith v. City of Winter Haven, 320 U. S. 228" and that there is no way around the evils resulting from that jurisdiction short of Congressional action (See 348 U. S. 48, 53, 54).

sistently held that the Federal Courts could not escape their responsibility under that grant of power by resorting to the procedure of remitting the parties to state courts for determination of local questions except in a very few truly exceptional cases, *here* the United States Courts are invited, indeed directed, to effectively defeat diversity jurisdiction by refraining from deciding state issues whenever they touch on "sovereign prerogative", including all eminent domain proceedings and presumably also all matters related to every power "inherent in state sovereignty", such as the police power, the taxing power, and every other "prerogative" "reserved to the states" under the Tenth Amendment to the United States Constitution.[4]

One further point, not stressed in the Dissent, should be noted. The only authority relied on for characterizing state eminent domain proceedings as of such "special and peculiar nature" (p. 4) as to require so hesitant and delicate handling by the courts of the United States is the Dissenting Opinion of Mr. Justice Holmes in *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 257 (1905). That Dissent (as the Court's Opinion here concedes) was entered to the ruling that an eminent domain proceeding is a "suit of a civil nature", (or, in the current terminology, a "civil action"), hence within the diversity jurisdiction of the Federal courts and removable. See 28 U. S. C., § 1332, 1441. Though Mr. Justice Holmes put forward a strong case

[4] As demonstrated hereinafter, there is no basis in the decisions of this Court, and none given here, for distinguishing between cases arising under a state's power of eminent domain and those involving the other "inherent" powers of the state, all being equally attributes of sovereignty. **Infra**, pp. 10-12.

for considering state condemnation cases as outside the scope of Federal jurisdiction, his view did not prevail and the Court would not apparently now overturn the *Madisonville* decision. Yet, the language and the arguments of the Dissent are quoted as precedent, indeed, as sole authority. Would it not be more appropriate to reproduce the holding of the Court in that case, which still prevails? Mr. Justice Harlan, speaking for the majority, quoted with approval (at 247-8) the following statement from *Boom Co. v. Patterson*, 98 U. S. 403, 406 (1878):

> "But notwithstanding the right is one that appertains to sovereignty, when the sovereign attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry takes the form of a proceeding before the courts between parties—the owners of the land on the one side, and the company seeking appropriation on the other,—there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State."

The Opinion goes on (at 250) to quote approvingly from *Mineral Range Railroad Co. v. Detroit & Lake Superior Copper Co.*, 25 F. 515, 520 (W. D. Mich., 1885), a decision already cited with approval by this Court in *Searl v. School District No. 2*, 124 U. S. 197, 200 (1888):

> "But we think that, in this particular, counsel overlook the distinction between the *power* to condemn, which confessedly resides in the State, and

proceedings to condemn which the State has delegated to its *courts.*"

Mr. Justice Harlan concludes for the Court, in his own words (at 255-6):

> "The exercise by the Circuit Courts of the United States of the jurisdiction thus conferred upon them is pursuant to the Supreme Law of the Land, and will not, in any proper sense, entrench upon the dignity, authority, or autonomy of the States; . . . In the exercise of that power a Circuit Court of the United States, sitting within the limits of a State and having jurisdiction of the parties, is, for every practical purpose, a court of that State. Its function, under such circumstances, is to enforce the rights of parties according to the law of the State . . ."

Clearly, the rationale of *Madisonville Traction Co.* is that a proceeding to condemn property under state eminent domain statutes is an ordinary law case of which the Federal courts have jurisdiction when there is diversity of citizenship and which they are competent to decide. This decision is the culmination of a long evolution which began with *Kohl v. United States*, 91 U. S. 367, 376 (1875), and was carried through *Boom Co. v. Patterson*, *supra*, the *Pacific Removal Cases*, 115 U. S. 1 (1885), and *Searl v. School District No. 2*, *supra*. It seems ironic that those who favored Federal jurisdiction of state eminent domain proceedings and won their long and difficult struggle should now see their work effectively set at naught by the decision here, without even the satisfaction of being allowed to defend their victory on the clear

ground of jurisdiction. Indeed, though the power of Federal courts to entertain such proceedings under their diversity juirsdiction is now undoubted,[5] they are told they must not, as a matter of discretion, decide the issues themselves, at least if more than the amount of compensation is contested. We wonder if Mr. Justice Harlan would have argued so forcibly to win his fruitless victory, or whether Mr. Justice Holmes would have been at such pains to dissent, had either known that, eventually, the whole debate would be mooted by the very liberal use of a device they did not know existed, the so-called "doctrine of abstention"?

3. The Decision Establishes a Dangerous Precedent.

A. Insofar as the instant decision justifies the application of the doctrine of abstention because the case involves an issue "intimately involved with sovereign prerogative" (p. 4), it constitutes a dangerous and far-reaching precedent. Though the Opinion apparently limits the holding to cases arising under the state's *power of eminent domain*, there is, in fact, no reasonable basis for thus restricting the rule. If abstention is appropriate here on the stated ground, it is equally proper in numerous other fields. For, as is said in *Mashuda*, in the Opinion signed by a majority of the Court, eminent domain is no more "mystically" involved with sovereignty than a host of other state activities. Thus, despite the attempt to confine its scope, the holding here, if allowed to stand,

[5] The matter is so clearly settled that when the Court in 1951 amended the Federal Rules of Civil Procedure to provide for condemnation cases, it expressly adverted to proceedings under state eminent domain statutes in the Federal courts. See Rule 71A(k). This point is made by the Court itself in **Mashuda** (pp. 8-9 of the printed Opinion).

must logically extend to every case which arises out of the direct or indirect,[6] exercize of a power inherent in state sovereignty.

The proposition that eminent domain is not the only power that is "inherent", or implicit, in state "sovereignty" is so fundamental as to require no discussion. Indeed, as early as *McCulloch v. Maryland*, 4 Wheat. 316, 429 (1819), Mr. Chief Justice Marshall settled that the state's *power of taxation* "is an incident of sovereignty", and that view has not changed. See *Collector v. Day, 11 Wall.* 113, 123 (1871); *Curry v. McCanless*, 307 U. S. 357, 366 (1939); *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444 (1940), in which the power of taxation is labelled "the most basic power of government." Likewise, the much broader *police powers* of the states were early characterized by Mr. Chief Justice Taney in the *Licence Cases*, 5 How. 504, 583 (1847), as "the powers of government inherent in every sovereignty to the extent of its dominions." See *In re Rahrer*, 140 U. S. 545, 554 (1891); *Holden v. Hardy*, 169 U. S. 366, 391, 392 (1898); *Jacobson v. Massachusetts*, 197 U. S. 11, 24-25 (1905); *Nebbia v. New York*, 291 U. S. 502, 523-525 (1934). The power of eminent domain cannot rightly be said to be more "intimately" related to state sover-

[6] In the instant case, the exercize of the state's power is indirect in that the condemnor is not the state itself, but the City of Thibodaux, to which a branch of that power was delegated. But we do not see how this "introduces" "a further aspect of sovereignty", for there is no attack on the **right** of the state **to delegate** the particular power contested, if the state itself could legally exercize it. The inquiry whether the state did, in fact, delegate the necessary power (i.e., whether the statute applies in the premises) has nothing whatever to do with "sovereign prerogative"; it is merely a question of statutory interpretation uncomplicated by fundamental issues of power.

eignty than the other two great powers because of older lineage or nobler origin; the police power and the taxing power have the same source, "sovereignty." Nor can it be claimed that a state's right of eminent domain is a *higher* attribute of sovereignty, immune, unlike its lesser brothers, from the Supreme Law of the Land. For it was settled, if not earlier, by the very case from which the Dissent is here quoted that the exercise by the states of their power of eminent domain *is* limited by the Federal Constitution. *Traction Co. v. St. Bernard Mining Co., supra,* at 251-252, and cases there cited.

It follows, we repeat, that the instant decision must logically condone, if not direct, abstention in every diversity case involving *any* governmental power of the states. If the Court did not intend such a sweeping ruling, we respectfully suggest it take this opportunity to reconsider the decision.

B. Insofar as emphasis is placed on the difficulty of the local law question as justification for the stay order here, that, also, establishes a dangerous precedent. For there are few diversity cases involving solely state law issues which reach this Court, or even the Courts of Appeals, where the state appellate courts have clearly resolved the question. Does the Court mean to apply the doctrine of abstention to all, or most, such cases? Surely, no. The Opinion appears to stress the admittedly unusual, but by no means unique,[7] circumstance that in this instance there are *no* decisions interpreting the key statute.[8] But, even assuming the meaning of the act is "dubious", would a series of partial and likely contradictory pro-

[7] See, e.g., **Toomer v. Witsell, 334 U. S. 385 (1948); Public Utilities Comm'n of California v. United States, 355 U. S. 534 (1958); Chicago v. Atchison, T. & S. F. R. Co., 357 U. S. 77, 84 (1958).**

nouncements upon it by the Louisiana tribunals have made the task any easier? Certainly, there is no novelty in suggesting that court opinions sometimes confuse more than they illuminate the statutory law.[9] If there were no dispute about the meaning of the Act, there would have been no controversy; and we cannot see what difference it makes whether the disagreement arises out of different readings of the statute itself or of court opinions 'interpreting" it. Mere difficulty in discovering the true meaning of the law (or, as it has been put, predicting the state court's ruling on the particular facts) cannot justify abstention, else the procedure of remitting the parties to state courts in diversity cases will no longer be the exception, but the rule, and the diversity jurisdiction will be emasculated.[10]

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[8] Too much has been made of the conflicting "Opinion of the Attorney General" (Appendix D of Petition for Certiorari). In the first place, it sets forth two patently erroneous grounds, neither supported by any authority, for the conclusion that the contemplated expropriation is not allowable: that there are "constitutional obstacles"; and that only "lands" are susceptible of expropriation in Louisiana. Moreover, the author obviously completely overlooked the key statute on the matter, Act 111 of 1900. Accordingly, we cannot see how the "Opinion" seriously clouds the issue.

[9] See, e.g., **Meredith v. Winter Haven**, 320 U. S. 228, 231 (1943).

[10] The Opinion of the Court is at pains to point out that the District Judge who issued the stay order here challenged was "experienced" (p. 2, n. 2; p. 5), had a "familiarity with the problems of local law" (p. 4), and was, indeed, "especially conversant with Louisiana law" (pp. 2-3, n. 2). While we fully share the Court's high regard for the Judge in question, we cannot understand that with such exceptional advantages he should be likened to an "outsider" (p. 5), unable to discern the true meaning of the statute involved, and unqualified to make an

C. The present decision might do little harm and some good if it tended to discourage litigants from invoking the Federal forum in controversies more properly left to the state tribunals. But, unfortunately, the contrary result may well follow. Indeed, the example of this case shows how effective a tactic the doctrine of abstention, liberally applied, can become in the hands of a defendant anxious to postpone decision (as a fair proportion of them must be, especially in condemnation cases). In a removable case to which the doctrine of abstention is held applicable there is nothing the plaintiff can do to avoid considerable delay, additional labor and expense.

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informed guess as to what the Louisiana Supreme Court might decide in the premises. Unless the Louisiana Court is meant to be characterized as the most unpredictable tribunal on earth, it would seem to us that, familiar as he is with the local law, the District Judge should have little difficulty in making a safe "prediction."

It may be noted that the "predictions" of Federal District Judges, even on purely local law issues, have been respected and followed by the Louisiana Supreme Court. Thus, **Wolfe v. Hurley**, 46 F. (2d) 515 (W. D. La., 1930), deciding a novel and difficult question under the state's peculiar "public servitude" doctrine, has been consistently cited, quoted, and followed by our high court. See **Mayer v. Board of Com'rs for Caddo Levee Dist.**, 177 La. 587, 150 So. 295, 298-9 (1933); **Fruyn v. Nelson Bros.**, 180 La. 760, 157 So. 585, 587 (1934); **Board of Com'rs of Tensas Levee District v. Franklin**, 219 La. 859, 54 So. (2d) 125, 128-9 (1951); **Board of Levee Com'rs v. Kelley**, 225 La. 441, 73 So. (2d) 299, 301 (1954); **Delaune v. Board of Commissioners**, 230 La. 117, 87 So. (2d) 749, 752 (1956); **Board of Com'rs for Pontchartrain L. Dist. v. Baron**, —— La. ——, 109 So. (2d) 441, 443, 444 (1959).

For, if he files his claim in state court, it can be removed,[11] and stayed, and he will be compelled to initiate a new action in the state court, prosecute it there through appeal, then return to the Federal court for further proceedings, and probably review on appeal. Filing initially in the Federal court saves him little, since he must still start over in the state court, and eventually return to the Federal forum.

In short, to borrow the forceful language of Mr. Justice Frankfurter,[12] this case illustrates the "perverse potentialities" of the doctrine of abstention. This "judicial sanction of professional astuteness" can but encourage "the natural selfishness of litigants to exploit the law's weaknesses."

CONCLUSION.

For the foregoing reasons, Respondent, City of Thibodaux, prays that a rehearing be granted herein, and that upon reconsideration the judgment of the Court of Appeals be affirmed and that this cause be remanded to the District Court with directions to recall the stay order

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[11] The fact that the Federal Court will remit the parties to the state court apparently does not authorize it to refuse the removal or remand the whole case. 28 U. S. C. §§ 1441, 1447. Respondent's alternative prayer here that the whole case be remanded to the appropriate state court was not commented on by the Court, for the reason, we assume, that it suggested an impossible solution. We take it as also settles that, except in an equitable case, the District Court could not dismiss the complaint under the doctrine of abstention, if it has jurisdiction.

[12] The three quoted phrases are taken from the Concurring Opinion in **Lumbermen's Casualty Co. v. Elbert**, 348 U. S. 53, 55, 57. Their use there was, of course, in a different context.

issued herein and to proceed with all deliberate speed to a decision of all issues in the case.

Respectfully submitted,

THEO F. CANGELOSI,
Special Counsel,
612 North Boulevard,
Baton Rouge, La.;
LOUIS FENNER CLAIBORNE,
Special Counsel,
304 Marine Building,
New Orleans 12, La.;
REMY CHIASSON,
City Attorney,
City Hall,
Thibodaux, La.,
Attorneys for Respondent.

By _____
Louis F. Claiborne

CERTIFICATE OF SERVICE.

I hereby certify that copies of the foregoing Petition for Rehearing have been served on Peltier & Peltier, Harvey Peltier, and Monroe & Lemann, J. Raburn Monroe, Andrew P. Carter, the attorneys for Louisiana Power & Light Company, Petitioner, by depositing the same properly addressed, first class postage prepaid, in the United States Mail, on this _____ day of June, 1959.

_____
Louis F. Claiborne